

***United States Court of Appeals
for the Second Circuit***



APPENDIX

NO. 75-7385

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

W. T. GRANT COMPANY,
Plaintiff-Appellee

v.

MARK S. HAINES,
Defendent-Appellant

A P P E N D I X Continued (VOLUME II)

PAGINATION AS IN ORIGINAL COPY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
W. T. GRANT COMPANY,

Plaintiff,

-against-

75 Civ. 471 (CLB)

AFFIDAVIT IN OPPOSITION
TO HAINES' MOTION TO
DISMISS

5 of 5

JOHN A. CHRISTENSEN, MAVIS
CHRISTENSEN, MARK S. HAINES,
DANIEL QUINLAN, JOHN W. WAITS,
JOHN W. WAITS, doing business
as JOHN W. WAITS ASSOCIATES,
JWW, INC., CENTURION DEVELOPMENT
CORPORATION, CENTURION OF
LOUISIANA, INC., MID-AMERICA
DEVELOPMENT, DEVELOPMENT
CORPORATION OF MID-AMERICA, INC.,
UMBAUGH POLE BUILDING COMPANY,
INC., also known as UMBACH CO.,
FRONTIER DEVELOPMENT CORPORATION,
JOHN DOES I THROUGH X, the names
being fictitious, the true names
of said defendants being unknown
to plaintiff at the present time,

Defendants.

-----X
STATE OF NEW YORK)
COUNTY OF NEW YORK)

ALLAN J. KIRSCHNER, being duly sworn, deposes and says:

1. I am a member of the firm of Liebman, Fulau, Robinson
& Perlman, attorneys for plaintiff W. T. Grant Company ("Grant")
and am fully familiar with the facts recited in this affidavit
which is submitted in opposition to defendant Haines' ("Haines")
motion to dismiss this action against him or disqualify my
firm from representing Grant.

2. I have read the accompanying affidavit of Robert J. Kelly and hereby incorporate in this affidavit all of Mr. Kelly's statements relating to what happened in my presence the morning of January 31, 1975 at Grant's headquarters in New York.

3. When, at approximately 9:30 a.m., January 31, 1975, Haines was brought into the office in which I was sitting, I was introduced to him as one of Grant's lawyers. I thereupon explained that I was not in the employ of Grant but was with the firm retained by Grant to investigate certain irregularities which occurred in Grant's real estate department which had recently come to the attention of Grant's management. I asked Haines if he would be willing to answer questions that I would be asking on behalf of Grant's management and whether it would be allright if I tape recorded our conversatio . Haines stated that he certainly would agree to respond to any questions that I was asking on behalf of Grant and that he had no objection to the conversation being tape recorded. At that point, I turned the tape recorder on and it remained in full view of Haines throughout the course of our discussion that morning, which lasted approximately 30 minutes.

4. Throughout the morning Haines did not once ask me whether or not he should have an attorney present, nor did I state, hint or infer that an attorney was not necessary or that he would not be permitted to have an attorney should he

so desire.

5. At no time during this conversation or the subsequent conversation which took place that afternoon for another half hour or 45 minutes were any promises of any kind made to Haines by me or anyone in my presence. Moreover, Haines was never threatened in any way. In fact, during one point of our conversation, Haines stated that he didn't like an inference that I was drawing. I told him that I was there to find out whatever facts I could in connection with the facts that came to Grant's attention and that if he wanted to say or add anything at any time he should do so. I made it clear that I was seeking to obtain the truth concerning his transaction with the Waits defendants and other developers. A copy of the transcripts of Haines' recorded conversation that I participated in will be given to the court for its in camera review. We, of course, will adhere to the Court's direction with respect to those transcripts. The original tape cassette recordings of those interviews are locked in our vault in our bank and can also be made available to the Court should it so desire. The tapes were transcribed by Management Safeguards, Inc. Since I am not an expert in tape recordings I did not even play back any tape at any time.

6. During that interview I asked Haines questions concerning the receipt by him of payments from John Waits and associations

and corporations owned or controlled by him. Haines admitted receiving approximately \$55,000 in cash* plus the use of certain automobiles and credit cards from Mr. Waits and his organization. However, Haines stated that approximately \$33,000.00 of that amount was an investment that Mr. Waits had made in certain property which was owned by Haines in Puerto Vallarta. Copies of many of the checks that Haines received are annexed to the order to show cause submitted by us in support of Grant's motion for an order of attachment and other related relief.

7. Basically, what occurred in that interview was that I informed Haines of the facts that we already knew relating to his activities with Waits and showed him the documentary proof that we had in our possession. Thus, no unfair advantage could have possibly been taken of Haines since all of the statements made by him that morning related to matters of which we already had knowledge.

8. Haines' statement that I told him it was allright to sign the authorizations and that if he did not sign them we could obtain the information anyway (Pars. 8 and 9 on pages 3 thourgh 4 of Haines' affidavit sworn to March 24, 1975) is

*We already knew that Haines received checks totaling in excess of \$35,000 and that he used cars and credit cards belonging to Mr. Waits or his organizations. In fact, Haines only admitted such defalcations after I referred to specific payments made to him.

totally false and is belied by the transcript of his interview. I explicitly stated:

"I also have prepared certain authorizations which I'd like you to sign which will permit us to make certain inquiries that we may not be able to check. I'll show them to you and if it is alright I'd like you to sign them." (Emphasis supplied)

9. At the conclusion of that short first interview, Haines agreed to take a polygraph examination. Again, no threats or promises were made. He was not in any way led to believe that unless he took a polygraph examination he would be discharged or in any way affected in connection with his employment by Grant. Haines left the room and went to another room and he was asked to wait for the polygraph examiner. After I had a discussion with the polygraph examiner concerning the relevant facts to be inquired into, the polygraph examiner, Mr. Detweiler, conducted an interview with Haines completely out of my presence and neither I nor anyone else connected with Grant took any part in it.

10. As appears from the accompanying affidavit of Mr. Detweiler and Exhibit 4 annexed thereto, Haines was informed that he could have a lawyer and at 10:50 A.M. was asked to and did sign a statement prepared by Management Safeguards Inc. which stated:

"No promise of record or promise of immunity was made to me. I have been told of my rights to consult a lawyer before taking this test."

Such signed statement also released Grant from any claim relating to the polygraph.* Thus, Haines statement that he was not given the opportunity to obtain a lawyer is belied by his own written statement. Moreover his other recent assertion of promises made to him is belied not only by the transcript of his interview but by the very document signed by Haines on that date.

11. When Haines was finished with the polygraph examiner, I escorted Mr. Haines to yet another room and asked him if he had had any lunch. He said that he had not, whereupon I asked him if he wanted to have lunch. He responded that he did not. I told him that I too did not have any lunch and that I was going to order a coke for myself and I asked him if he wanted a coke or anything else. It is my best recollection that Haines did not ask for or have a Coke and that the Coca-Cola was delivered to me. Thus, the inference that he was refused lunch is entirely inaccurate and his recollection concerning the Coca-Cola is also faulty.

12. The interview that followed in the afternnon also lasted no longer than 45 minues and, again, was tape recorded with Haines' permission. At the outset of that interview,

*Defendant Christensen who also agreed to take a polygraph examination on that day, signed an identical agreement which is annexed hereto as Exhibit 5.

the following questions were asked and answered:

"Q. Do you understand that our conversation is being tape recorded? Is that correct?

A. That is correct.

Q. And you have no objection to that, is that correct?

A. No objection.

Q. You are doing this voluntarily?

A. Yes, I am.

Q. No one has made any promises of any kind to you, have they?

A. No.

* * *

Q. We spoke this morning, is that correct?

A. That is right.

Q. And our conversation was tape recorded at that time as well?

A. That is correct.

Q. And that conversation was also recorded with your permission and consent, is that correct?

A. That is correct."

Thereafter, we recapped everything that was discussed that morning between Haines and myself, and Haines and Mr. Detweiler. At the end of the conversation at approximately 2:55 P.M., I asked Mr. Haines if he had anything else that he wished to say whereupon he stated "No, I do not". The interview was then

terminated.

13. After I had completed my first interview with Haines, I had discussions with Mr. Robinson, Mr. Kelly, and others concerning what action should be taken, if any, against Haines. No final decision was made to serve Haines until after the results of the statements that he made to Mr. Detweiler were reported to me and to Mr. Robinson and after I reported the results of my second interview with Haines. After the second interview was completed, it was agreed that I should serve process upon Haines, which I did in yet another office in Grant's premises. After I served Haines with the summons, complaint and Order to Show Cause he asked me what those papers were. I responded that they were a summons and complaint and an order to show cause returnable the following Monday morning which sought relief against his property. Mr. Haines asked me what all this meant and I informed him that I could not give him a legal opinion since he had interests adverse to my client and I urged him to obtain an attorney. I thereupon asked Haines to sign an acknowledgment of service whereupon he asked me whether or not he should do that without first obtaining an attorney as I had suggested. At that point I stated that all I could tell him was that he could acknowledge receipt of

service since I would be making out an affidavit and his acknowledgment of receipt of service was only an indication that he had in fact received those papers on that date. At no time did I suggest that he should not get an attorney. Quite the contrary.

14. As set forth in the accompanying memorandum of law in opposition to defendant Haines' motion, there was nothing improper about the activities conducted on behalf of Grant by our firm on that date. Grant, through its executives and attorneys, had every right to inquire of other executives about certain alleged improprieties which had recently come to the attention of Grant's management. Each and every one of the employee defendants had a duty, not only to be honest and to faithfully perform their obligations while in the employ of Grant, but a further duty to make full disclosure of any impropriety that they were involved in or knew of which occurred in the company. These high level and high paid executives owed the highest degree of loyalty and fiduciary duty to Grant.

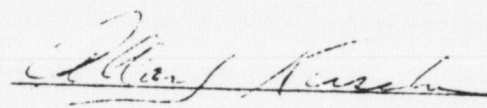
15. The canon and decisions relied upon by Haines in support of this extreme motion do not support his position that the complaint should be dismissed against him or that my firm should be disqualified from representing Grant. Rather, the canon and opinions thereunder establish that an attorney representing one party is free to consult with an adverse party

who is not represented by counsel so long as the questioning attorney does not attempt to give any legal advice to the adversary. Since Haines was not at that time represented by an attorney in this matter there was nothing improper in the discussions had with him. Haines' suggestion that he should not have been interrogated once the action had been filed is not persuasive. Haines seems to be alleging that if the action was not filed until the afternoon or the following day, no violation would have occurred. Such a position is absurd. If Haines' position had any validity, the time of service upon him, not the time of filing, should be critical. However, since the canon relied upon by Haines does not prohibit an attorney from communicating with a party in a pending action adverse to his client who is not represented by counsel, there certainly is no prohibition to communicating with someone prior to the time that he is served with process. The possibility existed that had Haines made full disclosure, especially if accompanied by an offer of restitution, he would not have been served with process at all. Thus, although the action would have technically been commenced, he would not have effectively been made a party defendant.

17. All of defendant's obligations in a law suit commence to run from the time said defendant is served; not from the time the action is technically commenced. The Federal require-

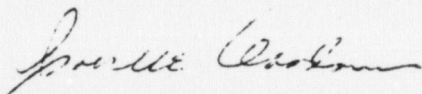
ment for filing does not effect the rights of a defendant. There is no prefiling requirement in the New York State courts. Thus, there should not be differing results with regard to an attorney's obligations under the Canons of Ethics depending upon the court in which the action is pending.

18. As set forth in the plaintiff's accompanying memorandum of law in opposition to this motion, this is the third motion made by Haines which attempts to delay the taking of his deposition and the bringing of this matter to a speedy resolution. In view of the foregoing, it is respectfully submitted that Haines' extreme and unprecedented motion be denied in its entirety and that the previously scheduled depositions of Haines and Haines' banks be directed to proceed immediately.



ALLAN J. KIRSCHNER

Sworn to before me this
9th day of April, 1975.



ISABELLE GOODMAN
Notary Public, State of New York
No. 41-6591250 Queens County
Certificate filed in New York County
Term Expires March 22, 1976

F

January 28, 1975

Mr. H. E. Pierson
Mr. J. A. Christensen
Mr. J. F. Crowley
Mr. R. J. Kelly
Mr. M. King

Mr. J. J. LaPlante
Mr. J. A. Pardo
Mr. P. T. Picarro
Mr. J. E. Sundman
Mr. H. Zorfas

RE: MANAGEMENT MEETING - Friday, January 31st

Following our meeting on Monday of this week, I pondered further the good discussion we had in respect to the efforts we could and should make to save many of our more promising smaller as well as larger stores from being closed. Excellent ideas were brought forth in respect to remerchandising, new layouts, replacement of fixtures, supervision, etc., etc.

It is obvious that if we are going to put teeth and action into this program there must be an operating plan. That's the purpose of the meeting this Friday, namely to put an operating plan on paper with responsibilities assigned to various individuals.

You will also recall that John Crowley strongly urged that we have, as in former times, a Real Estate Review. The idea has merit and to make a start along those lines I am asking Harry Pierson to arrange through Jack Christensen for all five Real Estate Negotiators to sit with the Management Committee at the meeting I am scheduleing for this coming Friday beginning at 9AM in the Board Room.

While I realize this meeting may conflict with some previous plans you have made I would like to see 100% attendance.

We will end this first session no later than 12 noon.

JAMES G. KENDRICK

JGK:dr

cl/4

EXHIBIT 1

-220-

JANUARY-FEBRUARY

Boyle / Jan 29 / 1965

MONDAY, 27 27

TUESDAY, 28 28

WEDNESDAY, 29 29

8:30			
9:00			
9:30			
10:00		NTS H. / B.	
10:30			
11:00			
11:30			
12:00	Trans. (ELE)		11:30
12:30			
1:00			
1:30			
2:00	RE Meeting	... / ...	
2:30	+ McComm	... / ...	
3:00			
3:30			
4:00			
4:30			
5:00			
EVE.		... / ...	

NOTES

FIFTH WEEK

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26	27	28	29	30	31	

SUN	MON	TUE	WED	THU	FRI	SAT
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SUN	MON	TUE	WED	THU	FRI	SAT
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FRIDAY, 31 31

SATURDAY, 1

SUNDAY, 2

8:30

9:00

9:30

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0:30

11:00

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12:00

12:30

1:00

1:30

2:00

2:30

3:00

21

4:00

4:30

5:00

EVE.

EXHIBIT 3

AGREEMENT

I MARK S. HAINES willingly and voluntarily agree to submit to a polygraph (lie detector) examination. The methods and techniques of the examination were explained to my satisfaction. I further agree to allow the necessary attachments to be placed on my body.

Furthermore, I release and forever discharge MANAGEMENT SAFEGUARDS, INC., the examiner administering this test, and W. T. GRANTS

from any and all claims whatsoever in connection with this examination and/or its results. I authorize the release of the results of this examination to those parties having an interest in same.

No duress, coercion, promise of reward or promise of immunity was made to me. I have been told of my rights to consult a lawyer before taking this test.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 31ST day of JANUARY 19 75.

[Signature]

(Examiner)

Mark S. Haines
(Signature)
1/31/75 10:50 A.M.
(Date)

AGREEMENT

I John A. Christensen willingly and voluntarily agree to submit to a polygraph (lie detector) examination. The methods and techniques of the examination were explained to my satisfaction. I further agree to allow the necessary attachments to be placed on my body.

Furthermore, I release and forever discharge MANAGEMENT SAFEGUARDS, INC., the examiner administering this test, and M. T. GRANT INC.

from any and all claims whatsoever in connection with this examination and/or its results. I authorize the release of the results of this examination to those parties having an interest in same.

No duress, coercion, promise of reward or promise of immunity was made to me. I have been told of my rights to consult a lawyer before taking this test.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 31st day of November 19 75.

Bell & Linder

11/31/75

(Examiner)

John A. Christensen
(Signature)
11/31/75
(Date)

126002

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
W. T. GRANT COMPANY,

Plaintiff,

-against-

75 Civ. 471 (CLB)

JOHN A. CHRISTENSEN, MAVIS CHRISTENSEN,
MARK S. HAINES, DANIEL QUINLAN, JOHN W.
WAITS, JOHN W. WAITS, doing business as
JOHN W. WAITS ASSOCIATES, JWW, INC.,
CENTURION DEVELOPMENT CORPORATION,
CENTURION OF LOUISIANA, INC., MID-
AMERICA DEVELOPMENT, DEVELOPMENT
CORPORATION OF MID-AMERICA, INC.,
UMBAUGH POLE BUILDING COMPANY, INC.,
also known as UMBACH CO., FRONTIER
DEVELOPMENT CORPORATION, JOHN DOES I
through X, the names being fictitious,
the true names of said defendants being
unknown to plaintiff at the present time,

AFFIDAVIT

Defendants.
-----x

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

ROBERT J. KELLY, being duly sworn, deposes
and says: 1. I am Vice President and General Counsel of
W. T. GRANT COMPANY, plaintiff in this action, and
I submit this affidavit in opposition to the motions of defend-
ants

(a) MARK S. HAINES ("Haines"), and

(b) JOHN W. WAITS ("Waits"), and

JOHN W. WAITS, doing business as JOHN W. WAITS ASSOCIATES, JWW, INC., CENTURION DEVELOPMENT CORPORATION, CENTURION OF LOUISIANA, INC., MID-AMERICA DEVELOPMENT, DEVELOPMENT CORPORATION OF MID-AMERICA, INC., and FRONTIER DEVELOPMENT CORPORATION (hereinafter collectively called "the Waits corporations"), to dismiss this action for

(i) lack of subject matter jurisdiction;

(ii) improper venue; and

(iii) in the case of Haines, to dismiss this action for improper service of process upon him, and

(c) JOHN A. CHRISTENSEN ("Christensen") and MAVIS CHRISTENSEN to dismiss the first two ("antitrust") counts of plaintiff's complaint.

2. At the outset, plaintiff notes that moving defendants have chosen to submit conclusory affidavits in support of their positions with respect to subject matter jurisdiction and venue. Moreover, the moving defendants have scrupulously avoided controverting the allegations contained both in plaintiff's complaint and in the affidavit submitted in

support of plaintiff's application for an order of attachment. The moving defendants failure to challenge plaintiff's assertions is significant in the context of these procedural motions; as plaintiff's memorandum of law demonstrates, the place of injury New York, is the place where the claim arises for venue purposes pursuant to 28 USC §1391(b). Similarly, the uncontroverted facts establish venue (in the alternative) under 15 USC §15,22 since the Waits corporations transacted business in New York (15 USC §22) and Haines and Waits were found in New York and had an agent in New York, respectively (15 USC §15).

3. This affidavit, therefore, will focus on those facts which are singularly relevant to venue and jurisdictional purposes. Toward that end, plaintiff incorporates by reference in this affidavit its complaint and the moving papers which it submitted in support of its application for an order of attachment, all of which are on file with this Court.

Subject Matter Jurisdiction

4. Plaintiff requests that this Court correct sua sponte an error appearing in paragraph 13 of plaintiff's complaint as Rule 60(a) authorizes. This paragraph alleges that defendant UMBAUGH POLE BUILDING COMPANY, INC. ("Umbaugh") is a New York corporation; in fact, as plaintiff knew when it drafted the complaint, and as Umbaugh has confirmed in its answer and at

its deposition held March 13, 1975, Umbaugh is an Ohio corporation with its principal place of business in Ohio. Therefore, there is complete diversity of citizenship and subject matter jurisdiction exists. In the event that plaintiff's oversight is not corrected by the Court, plaintiff will promptly move to amend its complaint.

5. Plaintiff is a nationwide publicly held corporation. The leasing of retail stores is the very heart and soul of its business. Defendants' argument that the misconduct alleged in the complaint is not actionable under the antitrust laws, is utterly fallacious since the scope of plaintiff's enterprise so clearly is interstate commerce. Making plaintiff a captive lessee in various locations throughout the United States not only affects the financial stance of plaintiff nationwide, it affects prices charged on goods purchased and sold in a variety of ways which affects interstate commerce. Thus, plaintiff has asserted valid claims under the antitrust laws.

5a. Subject matter jurisdiction also exists since the federal courts have exclusive jurisdiction of private antitrust suits. The uncontroverted facts adduced thus far, and plaintiff's continuing investigation (including disclosure proceedings in New York and Connecticut) is uncovering far more information which discloses that a broad based conspiracy existed which

is violative of the Sherman Act §1 and the Robinson-Patman Act §2(c). Plaintiff is in the process of deposing banks with which defendants did business, which will undoubtedly reveal still more information about the scope of the conspiracy. Accordingly, it is improper to dismiss this action, or the antitrust causes of action in plaintiff's complaint. Certainly plaintiff should be permitted to complete pretrial disclosure and present to this Court the full scope of the conspiracy. Moreover, Christensens' attorneys have authorized plaintiff to advise this Court that Christensen would plead the Fifth Amendment if asked this question:

"While you were employed by plaintiff, did you receive bribes or kickbacks from any developer or developers of shopping centers other than Waits or the Waits corporations which were doing business with plaintiff?"

Plaintiff now knows of several other developers; plaintiff should be permitted to develop its case although, as plaintiff's memorandum makes clear, plaintiff believes it has alleged sufficient antitrust causes of action. This is especially true since Waits and the Waits corporations consist of at least six (6) entities which conspired to violate the antitrust law of the United States by eliminating competition in a substantial portion of the United States where the market was affected by the loss of the benefits derived from the competition.

Facts Relating to Venue

6. Plaintiff is a Delaware corporation and maintains its corporate headquarters in New York City. The chief executive officers of Plaintiff have offices in New York City. Plaintiff maintains retail outlets in New York City and, nationwide, plaintiff maintains in excess of 1,000 retail outlets, many of which are located in shopping centers, which sell various goods at retail.

7. Christensen, plaintiff's Real Estate Vice-President, worked primarily in New York City and was the 19th highest salaried employee of plaintiff. Office space in New York City was available to both Haines and DANIEL QUINLAN ("Quinlan"), and both made frequent periodic visits to New York.

8. Haines and Quinlan visited New York (approximately twice monthly - often more frequently) with respect to leases for stores which they negotiated. After a lease had been negotiated, plaintiff's real estate negotiators (including Haines and Quinlan) forwarded the leases to New York for approval by Plaintiff's real estate screening committee, of which Christensen was a member. After this committee approved the lease, it would be presented to plaintiff's real estate committee, of which Christensen was also a member for approval. The real estate negotiators

including Haines or Quinlan, would normally attend both meetings in New York and would invariably persuade these committees of the wisdom of the proposed leases. Christensen also approved these leases and recommended that plaintiff execute them. Plaintiff relied upon the integrity, honesty and expertise of its real estate negotiators with respect to the selection of a site for a lease, the terms of such lease, and that said lease was in plaintiff's best interest.

9. After both committees approved the lease, it would be executed by plaintiff in New York and then forwarded to the lessor. Thus, by virtue of defendants acts, plaintiff was a captive lessee on Haines' and Quinlan's proposed leases for Waits and the Waits corporations. Christensen, as the insider-member on these committees, insured plaintiff's captivity.

10. Waits and the Waits corporations were actively engaged in the development of shopping centers in the southeast and mid-west portions of the United States. Waits is a principal of all the corporations set forth in this affidavit as the Waits corporations. It is apparent from the statement of Mr. Head, formerly one of Waits' principal employees and an officer in many of the Waits corporations (Exhibit B, plaintiff's motion for an order of attachment) and the memorandum of Waits himself (Exhibit W, plaintiff's motion for an order of attachment) that Waits

placed a very high value on plaintiff as a captive lessee to insure the success of the shopping centers being developed by his organization.

11. Therefore, in order to advance his interests, protect the success of his shopping centers and enhance the marketability of such shopping centers to other potential lessees, Waits and the Waits corporations purchased the loyalty of Christensen, Haines and Quinlan through extensive use of illegal bribes and kickbacks and successfully made plaintiff their captive lessee.

12. As set forth in plaintiff's affidavit in support of its motion for an order of attachment and as verified by Umbaugh during its deposition on March 13, 1975, Waits and the Waits corporations paid for a horse barn and fencing constructed by Umbaugh on property owned in Connecticut by Christensen. Much of the work performed by Umbaugh on the horse barn and fencing was done in the State of New York. Waits paid approximately \$47,000 for the horse barn and fencing. Moreover, Waits and the Waits corporations purchased a horse trailer and a LTD Station Wagon for Christensen and gave Christensen in his or his or in his wife's name approximately \$20,000 to \$25,000. The total benefit to Christensen from payments made by Waits was admitted by Christensen to be approximately \$75,000. However, documents

... far produced in disclosure reveal that the Christensons received bribes exceeding \$200,000. It may well be more. The total benefits received by Haines and Quinlan from Waits and the Waits corporations are fully documented in plaintiff's motion for an order of attachment and are now known to aggregate at least \$60,000 for Haines and \$47,000 for Quinlan. A review of the documents to be produced pursuant to subpoena already served by plaintiff will most probably reveal even greater defalcations.

13. For purposes of venue, however, what is significant is that plaintiff's injury was sustained in New York, where its corporate headquarters were located, rather than in the particular locality where the conspiracy and corruption occurred or where plaintiff's retail outlets for which bribes were paid are located. This conclusion is fortified by the fact that Christensen, as a member of both the real estate screening committee and real estate committee, sitting and meeting in New York, had also been corrupted by Waits and the Waits corporations. Therefore, the tort occurred in New York and plaintiff suffered injury in New York. As a matter of law, pursuant to 28 USC §1391(b), plaintiff's claim arose in New York and venue in this forum is proper.

14. Venue in this forum is likewise proper by virtue of plaintiff's alternate basis for venue, 15 USC §§15,22. Haines was actually "found" in New York within the meaning of §15.

14a. Since, as Christensen admitted, Waits met with Christensen in New York and controlled his activities in New York, Christensen was Waits and the Waits corporations' agent in New York. In fact, Haines and Quinlan were their agents as well. Moreover, since the relationship between Waits and Christensen (and Haines and Quinlan) was so close, and the amount of the payoffs and bribes to the extent now known, so extensive, Christensen, Haines and Quinlan were Waits' instrumentalities and tools for effectuating such frauds and therefore Christensen (and Haines and Quinlan) were Waits and the Waits corporations' agent for venue purposes within the meaning of §15.

15. Waits and the Waits corporations transacted business in New York. Waits made frequent trips to New York in connection with prepared leases for his shopping centers and such leases were reviewed by plaintiff's real estate screening committee and real estate committee in New York. Thus, given the nature of shopping center developments, the only way in which Waits and the Waits corporations (and defendants John Doe 1 through 10) could have transacted more business in New York would

to maintain an office in New York. As is readily apparent, the maintenance of such office was absolutely unnecessary since Christensen (and Haines and Quinlan) was functioning as their instrumentality in New York in insuring that their proposed leases would be approved. As plaintiff's memorandum of law demonstrates, the phrase "transacts business", as set forth in 15 USC §22, is given a practical rather than a theoretical application. Thus, in accordance with practicality, Waits and the Waits corporations were transacting business in New York for venue purposes.

Facts Relating to Haines' Service

16. Office space was maintained for Haines in plaintiff's headquarters in New York City. As already noted, he made frequent trips to New York for the purpose of obtaining approval by plaintiff's real estate screening committee and real estate committee. As is apparent from Haines' affidavit, meetings of plaintiff's real estate department were not uncommon. Moreover, until the time of his discharge, Haines remained an employee of plaintiff and was subject to plaintiff's supervision and control. Certainly, plaintiff had every right, as Haines' employer, to direct Haines to proceed to New York for legitimate business purposes of plaintiff. Indeed, on January 31, 1975, plaintiff had a legitimate business purpose, which was to confront Haines, who owed plaintiff a fiduciary duty of individual loyalty,

and others, with plaintiff's proof, and give Haines the opportunity to explain, and perhaps vindicate himself. Every real estate negotiator was summoned to and appeared in New York on that day. Haines' argument, that plaintiff had the right on all other occasions but this one to direct him to come to New York for a meeting, is totally unsupported and goes too far. The bona fides of the meeting on January 31, 1975 is underscored by the fact that Haines was not served with process until he had admitted acts of serious wrongdoing when confronted by plaintiff.

17. Service upon Haines was proper for one additional, and highly significant, reason. Plaintiff could have validly served Haines in Georgia, where he resides (see plaintiff's memorandum). The authorities cited by Haines involve persons over whom jurisdiction could not have been otherwise obtained in the jurisdiction where the action was commenced. To quash service on Haines will merely result in compelling plaintiff to re-serve Haines, which will accomplish little beyond the slight inconvenience it causes plaintiff. Service upon Haines should be sustained.

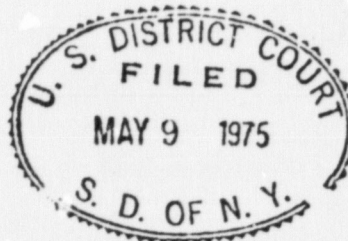
18. In view of the foregoing, plaintiff respectfully requests that the motions of the moving defendants be denied in all respects.

Sworn to before me this
18th of March, 1975

EDWARD J. WAIT
Notary Public, State of New York
No. 100000127
Qualified in New York County
Commission Expires March 30, 1977

S. Robert J. Kelley

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



-----X
W. T. GRANT COMPANY,

Plaintiff,

-against-

JOHN A. CHRISTENSEN, MAVIS CHRISTENSEN, MARK S. HAINES, DANIEL QUINLAN, JOHN W. WAITS, JOHN W. WAITS ASSOCIATES, JWW, INC., CENTURION DEVELOPMENT CORPORATION, CENTURION OF LOUISIANA, INC., MID-AMERICA DEVELOPMENT, DEVELOPMENT CORPORATION OF MID-AMERICA, INC., UмбаUGH POLE BUILDING COMPANY, INC., also known as UмбаUGH CO., FRONTIER DEVELOPMENT CORPORATION, JOHN DOES I THROUGH X, the names being fictitious, the true names of said defendants being unknown to plaintiff at the present time,

Defendants.
-----X

75 Civ. 471-CLB

#42592
MEMORANDUM DECISION

Brieant, J.

In this action to recover damages, and treble damages, for anti-trust violations, and for various pendent tort and contract claims, there have been submitted motions (I) by defendants Christensen, joined in by defendants Umbaugh, Waits and others, to dismiss the anti-trust claims, Counts I and II for failure to state a claim;^{1/}

*Noted 1/8/75
Filed 5/19/75*

-237-

(II) by defendants Haines, joined in by defendant Quinlan, to vacate personal service of the summons and complaint upon them because effected by ruse, and to dismiss for improper venue (defendants John W. Waits and his affiliates, Centurion Development Corporation, Centurion of Louisiana, Inc., Mid-America Development, Development Corporation of Mid-America, Inc., and Frontier Development Corporation join in the attack on venue); and (III) by defendant Haines to dismiss the complaint as to him, or alternatively, to disqualify plaintiff's attorneys from representing it in this litigation, for claimed violation of the Code of Professional Responsibility.

Plaintiff ("Grant") is the owner and operator of approximately 1,180 stores, located for the most part in shopping centers or retail business districts throughout the country, and dealing in general merchandise at retail. Grant leases its stores from shopping center developers and others. Many such stores are erected in shopping centers specially for Grant, pursuant to lease agreements with developers and builders.

Defendants John A. Christensen, Mark S. Haines and Daniel Quinlan were at all material times, officers or employees

of Grant's real estate department. Defendant Mavis Christensen is the wife of John A. Christensen. Defendant John W. Waits, directly or by corporations or business entities controlled by him, is a developer and builder of stores in shopping centers. He is said to control the corporate defendants other than Umbaugh. These defendants are referred to collectively as "Waits" for purposes of this Memorandum Decision.

Treating as true the allegations in the complaint, and the contentions developed at our hearing on March 19, 1975, it seems that Grant discovered, about January 1975, that its officers and employees had conspired with Waits to effectuate a scheme whereby the Waits defendants would obtain preferment in the awarding of leases for Grant stores, at unreasonably high rentals, or in unfavorable locations and on unfavorable terms, and that Grant would be committed to such arrangements with Waits by reason of bribes secretly paid by or in behalf of Waits to the employee defendants John Christensen, Mark Haines and Daniel Quinlan. Mrs. Christensen is sued as a joint recipient with her husband.^{2/}

Plaintiff asserts that Waits paid off its officers and employees by means of bribes to induce them to enter into lease

arrangements with Waits corporations, thereby "eliminating competitive leasing opportunities" and "freezing out other prospective lessors" (Complaint, ¶39). On its first claim, plaintiff claims damages of "at least \$5,000,000.00".^{3/}

Count Two, based on the same facts, pleads a violation of §340 of the New York General Business Law and similar statutes in effect in other jurisdictions, which forbid what is known as commercial bribery.

The remaining counts, twenty-seven (27) in number, comprising some sixty-nine (69) separately numbered paragraphs, assert various claims to recover for unfair competition, and intentional torts, to impose constructive trusts upon the bribe proceeds, to recover for fraud, to recapture salaries paid to faithless employees, as well as damages for breach of employment agreements, and for inducing breach of employment contracts and violation of fiduciary duties and conspiracy. All these counts are pleaded in reliance on pendent jurisdiction, and as arising under state or common law.

I

FAILURE TO STATE A CLAIM

Defendants Christensen, joined by Umbaugh, move to dismiss Counts I and II of the complaint, pursuant to Rule 12(b)(6) for failure to state a claim. The Waits defendants raise the same issue with respect to the anti-trust claims, but do so by motion styled as to dismiss for "lack of (subject matter) jurisdiction, based upon plaintiff's failure to show ... (b) a federal question under §4 of the Clayton Act and §1 of the Sherman Act, pursuant to 28 U.S.C. §1337." We treat the motion of the Waits defendants as a motion under Rule 12(b)(6), F.R.Civ.P. for failure to state a claim.

Count I seeks, impermissibly, to convert a claim for fraud, deceit, bribery and breach of an agent's duty of undivided loyalty into a violation of the Sherman Act. Such attempts have been rejected. Here, Grant is outside the "target area" of the alleged anti-trust conspiracy. Read most favorably, the complaint shows that Waits and his affiliates, by means of bribes and conspiracy with Grant's faithless agents or employees, made Grant a "captive lessee" of the Waits group in certain cities. Other builders, developers and lessors, Waits' competitors, were prevented from leasing to Grant; they were unable to get fair consideration

of their competing proposals to build and lease, from Grant's faithless officers. Perhaps these other builders might sue defendants. [But cf. George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir. 1974), cert. denied 400 U.S. 850.] But Grant can state no claim thereon arising under the anti-trust laws. As held in Billy Baxter v. Coca Cola Company, 431 F.2d 183, 187 (2d Cir. 1970):

"Section 4 of the Clayton Act, 15 U.S.C. §15, provides:

'That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor * * * and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.'

The statutory requirement that treble damage suits be based on injuries which occur 'by reason of' antitrust violations expressly restricts the right to sue under this section. There must be a causal connection between an antitrust violation and an injury sufficient for the trier of fact to establish that the violation was a 'material cause' of or a 'substantial factor' in the occurrence of damage. ... [citations omitted] Contourless rules of causation would pose the threat of a parallel relaxation of the standard of business behavior enforced by the allowance of treble recovery. Consequently, a plaintiff must allege a causative link to his injury which is 'direct' rather

than 'incidental' or which indicates that his business or property was in the 'target area' of the defendant's illegal act."

See also, SCM Corporation v. Radio Corporation of America, 407 F.2d 166, 169 (2d Cir. 1969):

"[A]ssuming the factual allegations to be true, 'the victims of plaintiff's antitrust violations, the people in the 'target area,' are plaintiff's competitors, the manufacturers of Electrofax machines and paper."

Expressed differently, those directly injured here were the competitors of Waits, not Grant or its competitors. As stated in Calderone Enterprises Corp. v. United Artists Theatre Circuit, 454 F.2d 1292, 1295 (2d Cir. 1971):

"In a series of decisions over the last 15 years, in all of which certiorari was denied by the Supreme Court, this court has committed itself to the principle that in order to have 'standing' to sue for treble damages under §4 of the Clayton Act, a person must be within the 'target area' of the alleged antitrust conspiracy, i.e., a person against whom the conspiracy was aimed, such as a competitor of the persons sued. Accordingly we have drawn a line excluding those who have suffered economic damage by virtue of their relationships with 'targets' or with participants in an alleged antitrust conspiracy, rather than by being 'targets' themselves."

Our conclusion would be no different if more than one

developer were involved. Count I is dismissed for failure to state a claim. Count II, based in part on the New York statute is regarded as a valid pendent claim. It may well be that plaintiff is within the class of persons likely to be damaged as a result of commercial bribery, intended to be protected by the state statutes relied upon. At the present posture of the pleadings, there is no need to consider whether, on the facts pleaded, a claim could be stated under §2(c) of the Robinson-Patman Act [15 U.S.C. §13(c)].

We need not reach the venue question, but would follow Judge Gurfein's views expressed in Iranian Shipping Lines, S.A. v. Moraites, 377 F.Supp. 644 (S.D.N.Y. 1974), and in the cases therein cited. See also Sack v. Low, 478 F.2d 360, 365 (2d Cir. 1973).

The pendent claims, counts II through XXIX inclusive are dismissed, without prejudice, solely for want of a valid federal claim upon which to be pendent.^{4/}

SERVICE OF SUMMONS AND COMPLAINT

The complaint in this action was filed in this Court on January 31, 1975 at 9:43 A.M., at which time, pursuant to Rule 12(a) of the General Rules of this Court, our Clerk executed authorization for service of process by plaintiff's attorneys.

Defendant Mark Haines was Grant's Southern Real Estate Manager. He resides in Georgia and is regularly employed at Grant's Atlanta office. Defendant Daniel Quinlan was the Midwest Real Estate Manager. He resides in Illinois and is regularly employed at Grant's Chicago office. The facts concerning service of process upon Haines and Quinlan are indistinguishable. Accordingly, we refer hereafter only to Haines.

The affidavit of Robert Kruger, Esq., sworn to and submitted to this Court on January 31, 1975 in support of plaintiff's application for an order pursuant to local Rule 12(a), permitting Kruger and certain other named members or employees of plaintiff's law firm, to serve process upon defendants rather than having the United States Marshal do so, stated, disingenuously, that (14):

"... Haines and Quinlan are to arrive this morning at plaintiff's [New York City]

executive offices for a real estate conference. When confronted with plaintiff's allegations, they will undoubtedly leave New York as quickly as possible, take steps to secret their ill gotten gains, and cover their tracks."

Haines resided at all relevant times in Georgia, and had his only office in Atlanta. He had no office in New York, no secretary there and no telephone extension. However, he did attend at plaintiff's head office in New York on frequent occasions, and when he did so, office space was made available for his convenience. Until his discharge on January 31st, Haines was an employee of the plaintiff, and the affidavit of Robert J. Kelly, Vice President and General Counsel of plaintiff, correctly states ("16) "certainly plaintiff had every right, as Haines' employer, to direct Haines to proceed to New York for legitimate business purposes of plaintiff."

Kelly then goes on to state that:

"Indeed, on January 31, 1975, plaintiff had a legitimate business purpose, which was to confront Haines, who owed plaintiff a fiduciary duty of individual (sic, probably intended to be "undivided") loyalty, and others, with plaintiff's proof, and give Haines the opportunity to explain, and perhaps vindicate himself."

It is undisputed that on Tuesday, January 28, 1975 Haines received a message at his office to telephone Christensen's secretary, who told him that a special meeting had been called at Grant's New York office, beginning at 9:00 A.M. on Friday, January 31, 1975. On January 30th, Christensen told Haines that he had been told by Grant's Chief Executive Officer that there was to be a "superficial real estate review" at the meeting called for Friday.

Intending to be present at such meeting in accordance with his employer's direction, Haines arrived in New York, and at 8:45 A.M., and together with Quinlan and other real estate personnel, went to the Board of Directors room. When they arrived there, the secretary of Mr. Kendrick, Grant's Chief Executive Officer, told them the scheduled meeting had been "cancelled," but that they were not to go anywhere.

Shortly thereafter, Grant's house counsel, and the attorneys for plaintiff in this action arrived, and commenced an interrogation of defendants John Christensen, Mark Haines, Daniel Quinlan and others. This interrogation related to the claimed frauds alleged in this action, and included an electronic

"lie detector" test. These proceedings continued from approximately 9:30 A.M. until 3:05 P.M., when, for the first time, the attorneys informed defendants of the pendency of this lawsuit filed that morning in this Court at 9:43 A.M., and acting pursuant to the Rule 12(a) order, served the summons and complaint on each of them.

John Christensen's regular place of employment was New York City. However, but for the "meeting," neither Haines nor Quinlan would have been present in New York on that date, and if they had known of the pendency of the lawsuit and the intention of Grant's counsel to effect personal service upon them in New York, following which they would be discharged from Grant's employment, neither of them would have attended. Plaintiff does not seriously argue otherwise.

It is obvious to the Court that calling the meeting was a mere sham, a ruse or artifice to obtain the presence of these two non-residents in the state for service of process, and for the further purpose of interrogating them as to their misconduct, without the necessity of travelling to Georgia or Illinois. If a bona fide purpose in connection with the employment of these

defendants had necessitated their presence in New York; in other words, if there really had been an intention to hold a "superficial discussion" of the corporation's real estate, as a part of the regular duties of these executives, this Court would have no doubt that service effected at such time would be valid. Here, there is no colorable excuse for the presence of these defendants in New York on the date of service, except that they were called in under false pretenses to effect service, and to obtain admissions of wrongdoing.

We must reject the contention that this conduct is somehow excused because the plaintiff withheld service of the process until after the interrogation. It is preposterous to suggest that these defendants could have done or said anything by way of protestations of innocence, which would have dissuaded plaintiff from serving process on them before their departure from the state. Plaintiff's counsel had prepared and filed in this Court a complaint of 32 pages pleading 29 separate counts, or causes of action, most of them stated in some detail. Plaintiff concedes that this remarkable pleading had been in process of creation for at least a week prior to January 31st, and therefore

prior to calling the "meeting". It was signed by an attorney pursuant to Rule 11, F.R.Civ.P., which provides that:

"The signature of an attorney constitutes a certificate by him that he had read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it."

It is insincere to argue to this Court that, having prepared and filed these lengthy allegations, and having obtained a Rule 12(a) order to permit expeditious service thereof, and having applied for orders of attachment, the attorneys intended to be diverted from doing so by anything these defendants would say to them in the course of the interrogation, or by any such electronic voodoo as the results of a "lie detector" test. Apparently, press releases announcing defendants' depredations against Grant, and its commencement of the action, were in preparation. Although the next day was Saturday, a complete article is found in the New York Times for that date. See exhibits attached to affidavit of Robert Layton, Esq., sworn to March 6, 1975.

Service in New York, on one possible view of this litigation may have importance beyond that concerned with obtaining in personam jurisdiction. If a proper anti-trust claim can be

stated, such service in New York may support venue here, pursuant to 15 U.S.C. §15, upon a theory that Haines and Quinlan were "found" in this District on January 31, 1975 when they were lured to New York and served.

For that and other reasons we cannot say that the motion to vacate service is so trivial that it should be denied because personal jurisdiction can in any event be obtained by "long arm" service at movants' places of residence. To take such an attitude would encourage like conduct in other cases, involving abuse of our process.

Personal service upon Haines and Quinlan is vacated.

Orlean Street Ry. Co. v. Fairmount Const. Co., 55 App.Div. 292.

67 N.Y.S. 165 (N.Y. 4th Dept. 1900); Terlizzi v. Brodie, 38 A.D.2d

762, 329 N.Y.S.2d 762 (2d Dept. 1972); Century Brick Corp. v.

Bennett, 235 F.Supp. 455 (W.D. Pa. 1964).

III

HAINES' MOTION TO DISMISS, OR DISQUALIFY COUNSEL

Defendant Haines has asked the Court, in the alternative, to dismiss him from the case, or disqualify plaintiff's attorneys from representing plaintiff in this litigation. The claimed basis for the motion is "flagrant violation of the Code of Professional Responsibility" (Point heading, p.5, Haines Memorandum).

As noted previously, the complaint was subscribed by the attorneys and filed with the Clerk of this Court at 9:43 A.M. on January 31, 1975. At 10:45 A.M. the same law firm obtained from me an order to show cause for a preliminary injunction and an order of attachment. The order obtained from the Clerk permitting process to be served by members or employees of the law firm has been mentioned in part II of this Memorandum. As noted, plaintiff and/or its attorneys had effected a ruse by which defendant Haines and others were lured into New York to plaintiff's office on the pretext of attending a meeting of plaintiff's real estate department, when in fact the sole purpose of the meeting was to effect personal service on Haines and others in New York, and to interrogate them concerning this litigation. These facts were discussed in further detail in part II, supra, in connection with motions to vacate service of process.

Instead of attending a real estate meeting as they understood they were to do, Haines and other employees were told that the meeting had been cancelled, but that they were not to leave. Approximately five and a half hours of interrogation took place, with questions being asked by plaintiff's attorneys in his action, and Grant's house counsel.

At some point in these proceedings, Haines and others were asked to and did submit to an electronic test performed by third parties, utilizing a machine referred to as a "lie detector". After this had been done, and after plaintiff or its attorneys had recorded the interviews with Haines and others, at approximately 3:00 P.M. on January 31st our process was served.

Movant relies on Disciplinary Rule 7-104(A)(1) of the Code of Professional Responsibility in effect in New York as adopted by the New York State Bar Association effective January 1, 1970. This rule, which was adopted substantially unchanged from a prior canon of professional ethics in effect in New York, reads in relevant part as follows:

"(A) During the course of his representation of a client a lawyer shall not:

(1) Communicate or cause another to

communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so."

There was no deception practiced by the attorneys insofar as concerns their character and the nature of their representation. They disclosed immediately that they were members of a law firm which had been retained by Grant to look into problems affecting certain of Grant's commercial dealings with shopping center developers and landlords. The identity of Kelly, Grant's house counsel, was apparently known to movant. At the beginning, the members of the law firm present were introduced, and identified. Movant was informed that these attorneys were representing plaintiff and investigating claims of their client which for simplicity may be characterized as suggestions or charges of commercial bribery.

Haines was not told until service of papers upon him that the attorneys had already signed the complaint and filed it in this Court, and indeed it was implied to him and those others present, that there was a possibility that he or they or some of them might, by making full disclosure of relevant facts, be able

to exculpate themselves and clear up any question as to whether they had accepted baksheesh from Waits or others doing business with Grant.

This latter representation made to Haines was presumably false. However, it does not rise to the level of a violation of the Code of Professional Responsibility.

It was clear to Haines at all times that the attorneys were representing an interest adverse to him; they were charging him with a serious breach of fiduciary duty, and indeed, with criminal conduct.

The purpose of DR 7-104(A)(1) is to prevent the attorney for one party from approaching the client of another without the consent of the lawyer representing the person so approached. This is to prevent unseemly professional friction arising between the two attorneys. The attorney for one adverse party may consent to having the attorney for the other party speak to his client. The rule contemplates this. Here, Haines had no attorney, and accordingly the rule was not violated.

The Standing Committee on Professional Ethics of the

American Bar Association (Informal Opinion No. 908, issued February 24, 1966), dealt with the question of "attorney interviewing and taking a statement from an adverse party who he may reasonably expect will retain counsel but is not represented."

The Committee therein states:

"... we do not feel that there is anything unethical in the attorney for a potential plaintiff interviewing the potential defendant, and taking his statement, if the attorney advises the potential defendant witness that he is conducting the interview and attempting to take the statement in his position as attorney for the claimant."

Here there was an apparent attempt to mislead in that the attorney implied that there was uncertainty as to whether Haines would be sued, and a possibility that Haines might be able to exculpate himself and keep his job. In the attorneys words:

"If you have any additional information which you think would help us, tell us that. We'd like to be able to clear your name from this if that's possible. There's two things, one, give us any other information that you can. Two, give us authority to do further checking into you and your relationship with Mr. Waits." [Emphasis added-quoted from in camera exhibit referred to at p.3 of the affidavit of Allan J. Kirschner, Esq., sworn to April 9, 1975.]

This Court is satisfied upon all it has heard that nothing

Haines could have said or done on January 31st would have cleared his name. Indeed, plaintiff had independent documentary evidence in its possession long prior to that date.

Haines was misled further in that apparently the attorneys pretended or implied that taking a "lie detector" test had some significance, or that the test itself or its results were meaningful, or would be so considered by Grant in determining whether or not to discharge Haines from his position of trust and confidence.

Movant is no inexperienced widow sought to be deprived of the family farm by city slickers. Instead, he is a mature, experienced, high level business executive, seasoned in the hurly-burly of the commercial real estate field. The charges made during his interview are serious, striking directly, as they do, upon his personal honor. Indeed, we are amazed that an innocent person so situated, charged with dishonesty of such magnitude, could refrain from fisticuffs. At very least, we would expect, he would make an obscene suggestion to the attorneys that they place their tape recorders, their "lie detectors" and their accusations within that orifice in which entire navies, realms and enterprises have been directed to be placed.

While the conduct complained of was somewhat overbearing and lacked the sensitivity which members of the bar should show in dealing with laymen, it does not rise to a level which would justify disqualifying the attorneys, or depriving Grant of such causes of action as it may have against movant.

The reported cases relied upon by movant do not warrant any such drastic relief. Ceramco, Inc. v. Lee Pharmaceuticals, ____ F.2d ____ (2d Cir. 1975), a case in which the Court refused to disqualify counsel, involved deception as to the adverse status of the attorney. There, an attorney made a telephone call to defendant's order department in California, and "without identifying himself or alluding to his capacity as opposing counsel" requested the names of houses in the Eastern District of New York which were distributing defendant's product. Implicit was a false representation that the caller was a customer who wished to buy the defendant's product, rather than a lawyer seeking to locate an outlet in that district for the purpose of founding venue in a trademark infringement case.

In the instant case, there was no express or implied misrepresentation by counsel as to the fact that they were attorneys

and that they were representing the adverse interest of Haines' employer in an investigation of possible misconduct of Haines and others in plaintiff's real estate department.

Similarly in Zeller v. Boque Electric Manufacturing Corp., ____ F.Supp. ____ (S.D.N.Y. March 11, 1975), the attorney conducted an interview with an individual defendant whom he knew to be represented in the litigation by counsel. The misconduct in Zeller was squarely within the black letter of the Disciplinary Rule. The Court in Zeller, while properly disqualifying counsel, declined to dismiss the action, holding "I see no reason to penalize plaintiff himself for the ethical violation of his attorney."

Haines' motion to dismiss as to him or alternatively, to disqualify plaintiff's firm of attorneys is, for the foregoing reasons, denied.

CONCLUSION

Count I of the complaint is dismissed as to all defendants for failure to state a claim. As to the remaining counts, subject matter jurisdiction is pendent. The complaint on its face shows the absence of complete diversity. Perhaps an amended complaint could plead diversity, since plaintiff is apparently, mistaken as to the citizenship of Umbaugh. See footnote 4, p. 8 , supra. Under the circumstances of this case, we should not deem the complaint amended to show diversity, but rather should dismiss the other counts without prejudice, because of the dismissal of the first count.

Plaintiff may, if so advised, in the order to be entered hereon, provide for leave to serve and file an amended complaint repleading counts other than Count I as a diversity case. Alternatively, because those counts may raise unusual questions under the New York "long arm" provisions, plaintiff may prefer to seek relief in the state courts of New York.

Personal service upon defendants Quinlan and Haines is vacated. Such assets as may have been attached shall remain

subject thereto, and any bonds given in the action shall remain in effect pending expiration of the time within which an amended pleading may be filed, and also, to the extent the foregoing determinations are appealable, shall remain in effect pending appellate finality, or the further order of this Court.

Settle a single order on ten (10) days notice to all counsel appearing in the action.

Dated: New York, New York
May 8, 1975

CHARLES L. BRIEANT, JR.

CHARLES L. BRIEANT, JR.
U. S. D. J.

F O O T N O T E S

1. Certain of these motions are stated, inartistically, as based on lack of subject matter jurisdiction. Their thrust however, is directed towards failure to state a claim.
2. As to Mrs. Christensen, the complaint alleges merely that she "participated in and benefited by" the wrongful act (¶5). It appears that defendant Umbaugh Pole Building Co., Inc. pre-fabricates stables and farm buildings which it erects for customers. Beginning in about February 1973, Umbaugh built a private stable, appurtenances and fencing on the residence property of Mr. and Mrs. Christensen at Madison, Connecticut, for a total cost of \$47,618.00, which was paid by defendant Mid-America Development Co., of which Waits is President. The initial contract with Umbaugh was executed jointly by John Christensen and Mid-America Development Co., signing by "John W. Waits, Pres. (Billing Only)". Umbaugh billed Waits' corporation which apparently paid all or most of the bills. See exhibits attached to affidavit of Robert R. Mitchell, sworn to February 7, 1974 (sic, should be 1975) filed in this action.
3. The complaint pleads subject matter jurisdiction for its treble damage claim as arising under §4 of the Clayton Act

(15 U.S.C. §15) and §1 of the Sherman Act (15 U.S.C. §1).

Pendent and diversity jurisdiction are alleged with respect to the common law and New York State statutory claims.

While ¶1 of the complaint alleges diversity of citizenship, ¶13, read together with ¶3 shows affirmatively that no such diversity exists.

4. Apparently, the allegation in ¶13 to the effect that defendant Umbaugh Pole Building Company, Inc. is a New York corporation is incorrect. Umbaugh's attorney has advised the Court that Umbaugh is an Ohio corporation, and that its principal office is not in New York, although it is present in the City of Middletown, New York, in this District. If this is correct, it may well be that complete diversity does exist, although it does not so appear from the complaint.

Under the circumstances of this case, the Court should not waive this apparent defect in pleading, but, as indicated, will dismiss the pendent counts. If plaintiff desires to litigate the matter as a diversity case it must do so in compliance with Rule 8(a)(1), F.R.Civ.P., tendering to defendants such fact questions as may affect the issue.

W. F. GRANT COMPANY,

Plaintiff, :

75 Civ. 471

- against - :

JOHN A. CHRISTENSEN, et al., :

Defendants. :

ORDER DISMISSING
COMPLAINT WITH LEAVE
TO REPLEAD

Defendants John W. Waits, John W. Waits, doing business as John W. Waits Associates, JWW, Inc., Centurion Development Corporation, Centurion of Louisiana, Inc., Mid-America Development, Development Corporation of Mid-America, Inc., and Frontier Development Corporation, having moved this court by notice of motion dated March 6, 1975, for an order dismissing the Complaint on the grounds of lack of jurisdiction and improper venue; defendants John A. Christensen and Mavis Christensen having moved this Court by notice of motion dated March 6, 1975 for an order dismissing Counts 1 and 2 of the Complaint on the grounds that said Counts failed to state a claim upon which relief can be granted; defendant Mark S. Haines, having moved this Court by notices of motion dated March 6 and March 26, 1975, for an order dismissing the action against him on the grounds of lack of subject matter jurisdiction, lack of personal jurisdiction and improper venue and violation of Disciplinary Rule 7-104 of the Code of Professional Responsibility, or in the alternative disqualifying the firm of Liebman, Eulau, Robinson & Perlman from further representing plaintiff herein; defendant Daniel Quinlan having orally joined in the aforesaid motions and the Court having

MICROFILM

CLB
JDS
considered the affidavits submitted in support of and in
opposition to the aforesaid motions and all exhibits thereto, the
pleadings filed by the parties, and all the other papers and
proceedings heretofore had herein, *including Transcript of hearing*

IT IS ORDERED THAT:

1. Count I is dismissed as to all defendants for
failure to state a claim;

CLB
JDS
2. Counts II-XXIX, inclusive, are dismissed *without prejudice* as to
all defendants for failure of subject matter jurisdiction, an
absence of complete diversity of citizenship appearing on the
face of the complaint;

3. Service of process upon defendants Quinlan and
Haines is vacated;

CLB
JDS
4. Defendant Haines' motion to dismiss the Complaint
as to him, or in the alternative to disqualify plaintiff's coun-
sel ~~because of acts of professional impropriety~~ is denied;

CLB
JDS
5. Such assets as may have been attached and any
bonds given in the action shall remain in effect pending expira-
tion of twenty days from the date of this Order within which
plaintiff may serve and file an amended complaint; *and thereafter*
if such complaint be filed.

6. The attachments and the bonds shall continue to
remain in effect pending the final determination of any appeals
taken from this Order or until the further order of this Court;

7. Plaintiff is granted leave to serve an amended
complaint within twenty days hereof.

Charles L. Briant Jr.
CHARLES L. BRIANT, U.S.D.J.

CLB
JDS
dated: New York, New York
May 4, 1975
JUN 3 1975

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)

: ss.:

COUNTY OF NEW YORK)

CAROLYN J. HILL, being duly sworn, deposes and says:

That deponent is not a party to the action, is over 18 years of age and resides in New York, New York; that on the 22nd day of May, 1975, deponent served the within Proposed Order upon:

ANDERSON, RUSSELL, KILL & OLICK, P.C.
Attorneys for Defendants John A.
Christensen and Mavis Christensen
630 Fifth Avenue
New York, New York 10020

EDWYN SILBERLING, ESQ.
Attorney for Defendant Daniel Quinlan
200 Park Avenue
New York, New York 10017

GIFFORD, WOODY, CARTER & HAYS, ESQS.
Attorneys for Defendant Umbaugh Pole
Building Company, Inc.
14 Wall Street
New York, New York 10005

David P. Steinmann, Esq.
PERZIGER, WOHL, FINKELSTEIN & STEINMANN
Local Counsel for Defendant John W. Waits
1350 Avenue of the Americas
New York, New York 10019

LIEBMAN, EULAU, ROBINSON & PERLMAN
Attorneys for Plaintiff
32 East 57th Street
New York, New York 10022

the addresses designated by said attorneys for that purpose by depositing same enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

Carolyn J. Hill
CAROLYN J. HILL

Sworn to before me this
22 day of May, 1975.

NOTARY PUBLIC

ASSISTANT M. SPARANO
Notary Public, State of New York
No. 24 327775
City of New York, County of New York
In and for the State of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
W. T. GRANT COMPANY,

Plaintiff,

: 75 Civ. 471 (CLB)

- against -

JOHN A. CHRISTENSEN, et al.,

: NOTICE OF APPEAL

Defendants.
-----X

S I R S:

PLEASE TAKE NOTICE that Mark S. Haines, defendant herein, hereby appeals to the United States Court of Appeals for the Second Circuit from such parts of the Order of the District Court (Charles L. Brieant, J.) entered June 3, 1975 as denied the motion of Mark S. Haines to disqualify counsel for plaintiff and continued in effect an Order of Attachment against the property of Mark S. Haines located outside of the State of New York following dismissal of the complaint and vacation of service of process upon him.

Dated: New York, New York
June 25, 1975

Yours, etc.,

TO: CLERK,
United States District
Court
United States Courthouse
Foley Square
New York, N.Y. 10007

LAYTON and SHERMAN
Attorneys for Defendant
Mark S. Haines

By Robert Layton
(A Member of the Firm)

50 Rockefeller Plaza
New York, New York 10020
(212) 586-4300

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

ASSUNTA M. SPARANO, being duly sworn, deposes and says:

That deponent is not a party to the action, is over 18 years of age and resides in Brooklyn, New York; that on the 25th day of June, 1975, deponent served the within Notice of Appeal upon:

CLERK,
United States District Court
United States Courthouse
Foley Square
New York, New York 10007

pursuant to Rule 3 of the Rules of Appellate Procedure by depositing the same enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Post Office within the State of New York.

Assunta M. Sparano

ASSUNTA M. SPARANO

Sworn to before me this
25th day of June, 1975.

Carolyn J. Hill

Notary Public

CAROLYN J. HILL
Notary Public, State of New York
No. 31-6697070
Qualified in New York County
Commission Expires March 30, 1976

Home Record

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2 UNITED STATES DISTRICT COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 -----X

5 W. T. GRANT COMPANY, :

6 Plaintiff, :

7 -against- :

75 Civ. 471

8 JOHN A. CHRISTENSEN, et al. :

9 Defendants. :

10 -----X

11
12 New York, New York
13 April 14, 1975
14 4:30 p.m.

14 BEFORE:

15 HON. CHARLES L. BRIEANT, JR.

16 DISTRICT JUDGE

17 APPEARANCES:

18 Liebman, Eulau, Robinson & Perlman, Esqs.
Attorneys for the plaintiff,

19 BY: Allan J. Kirschner, Esq., of Counsel.

20 Layton and Sherman, Esqs.,
Attorneys for defendants,

21 BY: Robert Layton, Esq. and
Frederick Sherman, Esq., of Counsel.

22 David Steinman, Esq.
23 Attorney for John Waites.

24 Edwyn Silberling, Esq.,
25 Attorney for Quinlan.

George Wolf,
Court Reporter

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2 THE COURT: Do I have all the papers in this
3 matter?

4 MR. KIRSCHNER: You have our papers.

5 MR. LAYTON: You have our motion papers, your
6 Honor. I believe there are some answering papers. I don't
7 believe there is any need for any reply papers. I have some
8 authority to call to the attention of the Court but I don't
9 think there is any need --

10 THE COURT: You have some authorities that are
11 not in your brief?

12 MR. LAYTON: In response to the answering papers,
13 yes.

14 THE COURT: Won't you write those down on a piece
15 of paper and hand those in?

16 MR. LAYTON: Yes, your Honor.

17 THE COURT: You may be heard in support of the
18 motion.

19 MR. LAYTON: Thank you, your Honor.

20 My name is Robert Layton and I move on behalf
21 of Mark S. Haines for dismissal of the action or, in the
22 alternative, disqualification of the firm of attorneys
23 representing plaintiff.

24 As set forth in our moving papers, this motion
25 is based upon certain activities which took place on

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2 January 31, 1975. I believe it is accurate to indicate
3 to the Court on the basis of our papers and the answering
4 papers of plaintiff that it is clear that no business meet-
5 ing ever took place on January 31, 1975, that this action
6 was filed at 9:43 a.m., and that it is beyond doubt that
7 Mr. Haines was not informed that he had been made a
8 defendant in a \$15,000,000 lawsuit until approximately
9 shortly after three p.m. on the afternoon of January 31,
10 1975.

11 The file in this action also indicates that
12 application for a temporary restraining order and order of
13 attachment was made to your Honor the morning of January 31,
14 1975, and your Honor struck the application for
15 relief and, in signing the order to show cause, carefully
16 noted that the order to show cause was issued at 10:45 a.m.

17 It is now plain that Mr. Haines was interrogated
18 for a substantial portion of the day on which the action
19 had already been commenced with regard to the exact subject
20 matter of the litigation in issue in the past. It is now
21 plain that written authorizations were signed by Mr. Haines.
22 It is now claimed by Grant that without said authorizations
23 it would not have been able to secure certain information
24 concerning his personal affairs, finances and other matters
25 which we really don't know about. It is also plain from the

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2 papers that the decision had already been made to serve him
3 with process.

4 THE COURT: Do you perceive any contested issues
5 of fact which facts are material to the disposition of this
6 particular motion? Is there something here you regard as
7 requiring an evidentiary hearing?

8 MR. LAYTON: No, your Honor. We believe that
9 the law is plain that the fact that on that day Mr. Haines
10 was not represented by counsel is irrelevant because the only
11 reason he was not represented by counsel is because of the
12 deliberate decision by Grant and its counsel not to inform
13 him that he had been sued.

14 THE COURT: Am I correct in understanding that
15 since this conference began your client knew or was directly
16 informed these people were attorneys for Grant and that they
17 were in an adversary position to your client to the extent
18 that they were charging your client with a crime or at
19 least highly immoral conduct with respect to his fiduciary
20 obligations to Grant as an employee? That seemed clear
21 at the outset, didn't it?

22 MR. LAYTON: It became clear they were investi-
23 gating this conduct and that it was an adversary circumstance.

24 THE COURT: And that they thought he had done
25 something wrong?

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2 MR. LAYTON: Very wrong, yes.

3 THE COURT: So there was no subterfuge in the
4 sense of calling up the adversary party and asking him if
5 he has an office in New York or anything like that, which
6 is a recent Second Circuit case with which you are probably
7 familiar. A lawyer called up the defendant corporation and
8 asked them a question as if he were a customer and then went
9 around and presented a summons and complaint at that address
10 that he discovered as a result of his call. This is clearly
11 an adversary interview.

12 MR. LAYTON: It was adversary and that is the
13 whole point. There was one major subterfuge.

14 THE COURT: Getting him into New York in the
15 first place?

16 MR. LAYTON: No, concealing from him he had been
17 sued for \$15,000,000 and that application had been already
18 made to the Court to enjoin him from transferring \$275,000
19 worth of his assets and also an order of attachment had
20 been applied for in that same amount. As distinguished
21 from the case your Honor mentioned, there the court held that
22 the inquiry was solely in aid of establishing jurisdiction
23 or ascertaining jurisdictional facts and venue facts, and
24 the court held that in that circumstance while there was an
25 invasion or improper conduct on the part of the attorney,

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2 it was not such as to lead to the kind of prejudice
3 that Judge Owen found in the Zeller against Bogue
4 Electric case.

5 THE COURT: What was the detriment that
6 resulted to your client from this procedure?

7 MR. LAYTON: The interrogation by adverse counsel
8 for a substantial period of time with respect to the very
9 subject matter at issue in the litigation.

10 THE COURT: But they knew when they were being
11 asked, did they not, that the attorney was adverse to
12 them, that he was representing Grant and that he was at
13 least inferentially accusing your client of wrongdoing?

14 MR. LAYTON: That's right. As Judge Owen held --

15 THE COURT: It was more than inferential, it
16 was pretty explicit. Your client could have told them he
17 was doing nothing wrong and could have told them where to
18 place their electronic equipment, he could have told them
19 what to do with it.

20 MR. LAYTON: That is not what the cases hold.
21 The Zeller case in particular is significant because there
22 Judge Owen, and I submit correctly, indicated that the
23 restriction is not one on the client, it is on the attorney.

24 The disciplinary rules, the purpose is to
25 restrict the conduct of the attorney in order to protect

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2 the layman from the situation where he does not understand
3 or he is placed in some kind of intimidating circumstance,
4 where he fears for his job, where he is constrained to
5 come forward. In Zeller, the defendant had counsel and
6 decided himself to attend the meeting irrespective of
7 the fact that he had counsel.

8 THE COURT: These people had no counsel with
9 respect to this incipient controversy with Grant, did they?

10 MR. LAYTON: At that time, that's right. But --

11 THE COURT: It isn't a case of going behind the
12 adverse attorney's back?

13 MR. LAYTON: That's right. It's a case of pre-
14 venting the layman from knowing that he has been sued and
15 interrogating him prior to the time that he knows that a
16 suit has already been commenced, plus effectively depriv-
17 ing him of his right to walk out, get counsel, examine the
18 complaint and then be examined later on in the litigation
19 with the aid of counsel under the Federal rules of civil
20 procedure.

21 There is a particular opinion of the American Bar
22 Association Committee on Ethics which I would like to call
23 to the Court's attention. It is Opinion 135.

24 THE COURT: Is it mentioned in your brief or
25 attached to your brief?

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2 MR. LAYTON: No. That is the one authority I
3 wanted to submit, your Honor. I can either hand up a
4 copy or --

5 THE COURT: Hand it up.

6 What is the date of it?

7 MR. LAYTON: It is 1935. It is March 15, 1935.

8 In particular, in that circumstance a public
9 prosecutor was permitted to also conduct civil litigation
10 even though he was a public prosecutor. He investigated
11 in the course of his official functions an auto accident
12 and interrogated the defendant prior to any civil litigation.

13 Thereafter he sought an opinion as to whether it
14 would be proper for him to represent the plaintiff in civil
15 litigation, and I believe significantly the Committee on
16 Professional Ethics indicated that information obtained
17 from an individual who may have felt quite naturally
18 under a sense of coercion or respect for actual or supposed
19 power is improper, unsuspecting, unshielded and a serious
20 disadvantage.

21 He submitted to interrogation by one who later,
22 as opposing counsel in a civil action, might use knowledge
23 thus acquired against him. Such approaches by an attorney
24 in private practice are improper. They are calculated to
25 mislead to his prejudice a party not represented by counsel.

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2 THE COURT: But the misleading part in that case
3 was representing that he was making the investigation in
4 his status as prosecutor, which I assume a prosecutor has
5 a right to do.

6 MR. LAYTON: There was no misrepresentation at
7 that time.

8 This situation is slightly different from that.
9 It was when the prosecutor asked for an opinion as to
10 whether he could properly represent the plaintiff in
11 civil litigation that the issue arose.

12 THE COURT: You mean using the information he
13 got in his official posture as a prosecutor --

14 MR. LAYTON: Yes.

15 THE COURT: -- which he had a right to get?

16 MR. LAYTON: Yes.

17 Here Grant, as an employer, had the right to
18 get certain information from its employee, but not after
19 it had instituted a lawsuit against him

20 The canon and code indicates that where litigation
21 is commenced or is contemplated, an adversary circumstance
22 is in existence and at that time the inhibition of the
23 canons apply to the attorney, not to the layman.

24 Now, the significant additional fact here, your
25 Honor, is that as distinguished from Judge Owen's situation

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2 in the Zeller case, which was a stockholders' action,
3 there was complete separation between counsel for the
4 plaintiff in Zeller, who was a remote stockholder, and it
5 was a class action on behalf of all stockholders, and here
6 Grant --

7 THE COURT: What did the attorney allegedly do
8 in Judge Owen's case?

9 MR. LAYTON: He telephoned one of the defendants
10 and asked if he could speak with him with a view toward
11 possibly dropping him out of the litigation.

12 The defendant, even though he was represented
13 by counsel, acceded to the request and there was about a
14 two-and-a-half hour interview.

15 THE COURT: That is factually distinguishable.
16 The man had an attorney. The man had no right to go
17 behind the adversary attorney's back.

18 MR. LAYTON: This situation is worse, your Honor,
19 I believe, here because the man was prevented from having
20 an attorney.

21 THE COURT: How was he prevented?

22 He could have told these people -- in fact, as
23 I understand it, in one of the affidavits it is claimed
24 one of the defendants refused to sign a paper until he
25 could go over it with his attorney.

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2 MR. LAYTON: No.

3 Your Honor, the point here is he was not told
4 that he had been sued until later in the afternoon. He
5 did not know that he had that type of litigation involved
6 with these people.

7 THE COURT: It was certainly apparent to him it
8 was contemplated, wasn't it?

9 MR. LAYTON: No, your Honor.

10 THE COURT: They made a very serious charge
11 against him, didn't they?

12 MR. LAYTON: Charges are made against employees
13 with some frequency.

14 THE COURT: They told him, "We think you did such
15 and such"; isn't that what they told him?

16 MR. LAYTON: Yes. But it is quite another thing
17 to have commenced a lawsuit, not informed him of the
18 existence of the lawsuit, to have sought substantial
19 relief against him, not told him that, waited.

20 Your Honor provided in his order service must be
21 made by 4:35 p.m. They waited until 3:05 p.m. to make
22 service.

23 THE COURT: You certainly understand that when
24 those orders were issued ex parte, this Court didn't know
25 about anything like that.

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2 MR. LAYTON: Of course I understand that.
3 That is one of the things we are complaining about, that
4 the total circumstance was such as to make maximum use
5 of the ordinarily granted orders of this Court and to
6 twist them for the purpose of taking advantage of Mr.
7 Haines.

8 THE COURT: What real advantage did they get
9 from him? What did they accomplish which they wouldn't
10 have gotten through normal discovery?

11 MR. LAYTON: They learned what his answer,
12 explanation, so-called story was with respect to all the
13 charges that they are suing about in this lawsuit.

14 THE COURT: That they could get from him, could
15 they not?

16 MR. LAYTON: Not with a lawyer being present, not
17 under the Federal rules of civil procedure.

18 THE COURT: They didn't get it under oath; did
19 they?

20 MR. LAYTON: They got it in haec verba. They
21 tape-recorded it. They submitted him to an electronic
22 polygraph test.

23 THE COURT: I regard that as exercise. It is
24 not coming in before me. I wouldn't be concerned over
25 that a bit.

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2 MR. LAYTON: The other point I wanted to make,
3 your Honor, is the distinction between the Zeller case and
4 this case.

5 Judge Owen found that the conduct of counsel
6 there was so improper as to disqualify counsel from acting
7 in the litigation. He found with respect to the question of
8 dismissal that there was remoteness and no contact between
9 the stockholder class and its counsel and its counsel could
10 be replaced.

11 This situation is different because the vice-
12 president of Grant is house counsel and sat through the
13 entire interrogation. The interrogation was transcribed.
14 Written authorizations were secured from Mr. Haines during
15 the course of this interrogation to what evidence we have
16 no idea.

17 The intertwining and interconnecting between the
18 plaintiff in this action and the attorney here and the
19 attorney in Zeller are distinguished, your Honor, and
20 they are entirely separate.

21 The canons that we have cited and the opinion of
22 the Second Circuit and the opinion of Judge Owen make
23 quite plain that it is not just bar associations that have
24 a responsibility in this area, that the Court --

25 THE COURT: The Court has responsibility.

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2 Don't concern yourself over that.

3 MR. LAYTON: What I am trying to make clear,
4 your Honor, is that the imprimatur, the restriction, is
5 placed upon the professional person with knowledge of what
6 should and should not be done, not upon a layman.

7 THE COURT: If they had not filed the action
8 until the following day, would you believe that you were
9 entitled to the relief you presently seek?

10 MR. LAYTON: Yes, your Honor. The improper
11 conduct here was the interrogation at the time that they
12 knew they were an adversary in an inimical position to the
13 layman. They could have fired him without interrogating
14 him, fired him and sued him and we would have no complaint.
15 But you can't have it both ways.

16 You can't sue him, conceal the fact that you
17 sued him, make application to a court for ex parte relief
18 and during the course of that entire day interrogate him with
19 respect to the same subject matter the lawsuit is about and
20 then wait until the end of the day, serve him with process
21 and then say go get an attorney.

22 THE COURT: Leaving aside the process, suppose
23 there had been no process issued until the following day?

24 MR. LAYTON: It wouldn't make any difference,
25 your Honor.

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2 THE COURT: Why?

3 MR. LAYTON: It is the interrogation that was
4 improper.

5 THE COURT: It is clear there was no subterfuge
6 as to whose side the attorneys were on.

7 MR. LAYTON: That's right.

8 THE COURT: And there was no withholding of
9 the fact the employer and the attorney were charging him
10 with a serious wrongdoing; that was made clear at the
11 beginning of the interview, is that so?

12 MR. LAYTON: As Mr. Haines said, I don't think it
13 is a crucial factor. He was given the impression if he
14 spoke and if he gave proper kinds of answers or offered it
15 in the right kind of way, he had a chance of keeping his
16 job. That's his impression.

17 The opposing affidavits indicate that they gave
18 him no particular inducement nor did they encourage him
19 to believe he wouldn't be served. I say it makes no
20 difference either way. The point of the matter is if they
21 gave him the impression that if he cooperated he wouldn't
22 be fired, that was the deception.

23 THE COURT: Do you tell me that absent pending,
24 litigation, an attorney for a corporation can't confront
25 an officer or employee of the corporation and say to him,

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2 in affect, "I think you took payoffs. . . . That's very
3 serious and what do you have to say for yourself"?

4 Is that what we are talking about here, that the
5 canons prevent that?

6 MR. LAYTON: Once they have the information --

7 THE COURT: Suppose he goes a step further and
8 he said, "You had better have a good answer or you will
9 lose your job".

10 MR. LAYTON: That's all right.

11 THE COURT: I think so. Whether it is different
12 with the action pending is another question.

13 Why don't you write down your authorities you
14 say are not in your brief and perhaps you can give a copy
15 to your adversary and I will take it as a supplementary
16 brief. Just write it down on a piece of paper.

17 MR. LAYTON: Fine.

18 THE COURT: Do you want to be heard, Mr.
19 Kirschner?

20 MR. KIRSCHNER: Your Honor, in asking the
21 questions you did really covered most of the points that I
22 was going to make.

23 If your Honor would just give me a few minutes
24 to made a few remarks, I would appreciate it.

25 The defendant, Haines, has come into court and

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2 asked for dismissal and disqualification based upon the
3 wording of a particular canon, and the wording of that
4 canon clearly states that when it is an adversary party
5 known to be represented, in view of that and in view of
6 the opinions on ethics as they appear in the Association
7 of the Bar reports and in the American Bar Association
8 reports, as set forth in our brief, all of the disputes
9 arose -- all of the branding of the attorneys' conduct
10 as unethical arose when there was an ongoing litigation
11 and when the interrogated party was, in fact, represented
12 and known to be represented by counsel.

13 THE COURT: You had litigation here?

14 MR. KIRSCHNER: I understand.

15 I said that where the adverse party was represented,
16 known to be represented, in an ongoing litigation, all
17 three of those. They were all present.

18 THE COURT: Or where there was a misrepresentation
19 of the attorneys' status.

20 MR. KIRSCHNER: Correct.

21 But that doesn't apply here and Mr. Layton set
22 that forth. My point, your Honor, is that Mr. Layton urges
23 an extension of the application of that canon. It is our
24 position that the canon should be construed as it has been
25 construed.

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2 I would like to add that if the Court were to
3 believe, and we do not, that there should be an extension
4 of the application of that canon, certainly it shouldn't
5 be applied retroactively.

6 THE COURT: It is a decision of law, isn't it?
7 It is always retroactive.

8 What bothers me with these applications, and we
9 are getting so many of them lately, not just this case, but
10 we get frequent applications to disqualify attorneys, and
11 under the Cohen rule, of course, that is an independent
12 order of the Court, which is reviewable on appeal and all
13 it really does is it prolongs and delays the disposition
14 of the litigation.

15 I find it hard to see that it would be a basis
16 for dismissing the claim, but if the attorneys are to be
17 disqualified or not, whatever I decide is a final order
18 and is reviewable on appeal and this litigation will be
19 delayed regardless of the outcome, I'm afraid.

20 MR. KIRSCHNER: I suggest, your Honor, there is
21 really no need to delay this action, and that was also
22 decided in Ceramco or referred to in Ceramco, where a
23 motion for a stay of proceedings was denied by the Court
24 below and the Second Circuit indicated it was properly
25 denied and it was made to the appellate court too, and

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2 denied by the appellate court.

3 So I appreciate your Honor's concern. It is our
4 concern too, and we expressed it in our papers, but I
5 don't think that the litigation need not go forward as
6 your Honor has several times indicated he would like it
7 to proceed, and expeditiously.

8 THE COURT: I tell that to everybody in every
9 case.

10 MR. KIRSCHNER: That may be, and rightully so.

11 THE COURT: Do I have all your papers also?

12 MR. KIRSCHNER: You have all our papers.

13 Of course, I haven't seen what Mr. Layton is
14 handing up to the Court and I don't know whether or not I
15 would like to respond to that.

16 These, of course, are serious --

17 THE COURT: Do you perceive any issue of fact
18 here?

19 MR. KIRSCHNER: No.

20 There is only one thing I take issue with this
21 morning and that is the decision was made to serve process
22 on Mr. Haines.

23 THE COURT: I would be inclined to reach that
24 decision independently for reasons which I expressed to you
25 the last time you were here.

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2 MR. KIRSCHNER: I understand that.

3 THE COURT: You signed a warrant, which is set
4 forth in Rule 11 of the Federal rules.

5 MR. KIRSCHNER: What is stated in the paper is
6 believed by us to be correct.

7 THE COURT: Foundation in fact?

8 MR. KIRSCHNER: Yes.

9 We submitted our foundation of fact by virtue
10 of the very evidence we showed to Mr. Haines that morning.

11 THE COURT: And by 10:30 of that day I had
12 issued an order directing the marshal. Now, it is true
13 that the marshal apparently didn't catch any assets of
14 Haines. However, there was every reason to suspect he
15 would.

16 MR. KIRSCHNER: That is not so. May I correct
17 you?

18 The order of attachment was not issued ex parte.
19 It was set for the following Monday, so you did not do that
20 until the following Monday, when Haines did appear with
21 counsel. So that is incorrect.

22 You signed an order to show cause, directing that
23 the motion come on for Monday.

24 THE COURT: I think I would have to infer from
25 the proceedings on our own docket that plaintiff had pretty

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2 much decided to proceed against these fellows.

3 MR. KIRSCHNER: There are statements by others
4 than myself, affidavits before your Honor, which indicate --
5 that had certain substantial admissions been made and
6 certain offers been made, that the possibility existed that
7 Haines would not have been served. As I understand it,
8 the filing of the papers is a function of the Court.

9 THE COURT: I don't think you have a right to
10 file papers if you don't intend in good faith when you
11 file them and get a Rule 4 order from our court, that you
12 don't intend to serve them or await a condition precedent.

13 I think that would be unethical conduct. If
14 someone came in here, verified a pleading, signed his name,
15 got a Rule 4 order and walked out, intending not to serve
16 it until some condition present was satisfied, I don't
17 think you ought to pursue that.

18 MR. KIRSCHNER: It was the other way around; not
19 to serve it unless something else occurred.

20 I wouldn't quarrel with that. There are statements
21 made --

22 THE COURT: I think you are estopped by your
23 Rule 11 signature. I would be prepared to find that.

24 MR. KIRSCHNER: It may be.

25 I think, your Honor, the application of the

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2 canons of ethics shouldn't differ because a party happened
3 to be in Federal court or in State court. In State court
4 an action isn't commenced until someone is served.

5 THE COURT: It is commenced with me the moment
6 it is filed.

7 You all know that.

8 MR. KIRSCHNER: There is no question about that.
9 Our point is there shouldn't be a different application of
10 the rules of the canons of ethics.

11 THE COURT: Certainly. When a lawyer writes
12 a New York State summons, which he can write on a paper
13 bag, and he carries it around in his pocket, he may do nothing
14 with it. It has no independent existence. It is like
15 making out a check or a promissory note and not delivering
16 it.

17 But when you come down here and pay the filing
18 fee and sign a Rule 11 statement at the foot of the pleading
19 and put it on our docket, an action is pending and there
20 is no way around that.

21 MR. KIRSCHNER: An action is pending, but you
22 have --

23 THE COURT: You started a lawsuit whether you
24 never served the fellow. You toll the statute and you
25 started a lawsuit. I wouldn't put any faith in that

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23

2 argument.

3 MR. KIRSCHNER: We set it forth --

4 THE COURT: I see no merit in that.

5 MR. KIRSCHNER: -- for the purpose I stated. All
6 the defendants' obligations, and then I would like to drop
7 this point, all the defendants' obligations begin to run
8 from the time he is served.

9 THE COURT: Not so. It is tolled from the
10 date the complaint is filed.

11 MR. KIRSCHNER: His obligation. Okay. I made
12 the point. It is set forth in the papers.

13 THE COURT: Once you take a Rule 4 order, it
14 is your obligation to make reasonable efforts to serve the
15 man. I don't think that is determinative.

16 What you did is what you did. The point is
17 whether it calls for any sanction in the form of disqualify-
18 ing an attorney or not.

19 MR. KIRSCHNER: I understand that. Those are
20 serious allegations, your Honor, that affect me and affect
21 my firm very greatly and, in all candor, I don't think
22 that there has been a violation of the letter or the spirit
23 of the canons of professional ethics, and one of the
24 opinions set forth in our brief involve just a claim where
25 a client had received information that it had been victimized

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2 by people out of its employ and the particular bar association
3 said that it was a duty of the attorney to investigate
4 that, and as long as there had been no misleading of Mr.
5 Haines, I don't think that the argument has any merit
6 whatsoever. In Zeller there was an ongoing litigation.

7 THE COURT: I will read all those. Would you
8 hand up that paper and make sure that Mr. Kirscher has a
9 copy of it, Mr. Layton.

10 MR. LAYTON: Yes, your Honor.

11 MR. KIRSCHNER: Your Honor, I do call your
12 attention to Exhibit 4 to our papers, which was a written
13 authorization by Mr. Haines where it referred to his being
14 informed of a right to an attorney before taking the
15 polygraph examination.

16 THE COURT: What does the polygraph test have to
17 do with it?

18 MR. KIRSCHNER: It is not going to be admitted,
19 but the point is he knew, as your Honor said --

20 THE COURT: Polygraph is nothing, absolutely
21 nothing.

22 MR. KIRSCHNER: We haven't said it is. We never
23 raised it. It was raised for the first time by Mr.
24 Haines.

25 THE COURT: I am amazed he took the test.

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2 But that is another question. I am amazed you fellows
3 asked him to take it. What possible good did it do you?
4 You don't put any faith in it, do you? It's voodoo, that's
5 what it is, voodoo.

6 MR. KIRSCHNER: It is not my decision, your
7 Honor.

8 THE COURT: It is a silly decision, whoever made
9 it.

10 All right. Please hand up that case you want me
11 to read.

12 MR. LAYTON: Yes, your Honor.

13 THE COURT: Give Mr. Kirschner a copy of it.

14 MR. KIRSCHNER: Is your Honor continuing the
15 stay of the deposition?

16 THE COURT: I am going to get right to this.

17 MR. KIRSCHNER: You did ask to be reminded of
18 it.

19 THE COURT: I am reminded.

20 I think I ought to hold the status quo. I will
21 dispose of this as promptly as I can.

22 MR. LAYTON: There is a statement in plaintiff's
23 brief, the Ceramco case, involved ongoing litigation.

24 THE COURT: It involved a fraud by the attorney,
25 where the attorney pretended to be a customer, isn't that

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2 so, the attorney called up the main office and pretended
3 to be a customer and asked whether they had an office in
4 New York?

5 MR. LAYTON: That's right. The distinction I
6 am asking is that was prior to instigation of any litigation.

7 THE COURT: But it was fraud, a misrepresentation
8 by the attorney. He acted in an inappropriate manner by
9 lying to the fellow. Isn't that so?

10 MR. LAYTON: He did not disclose for what purpose
11 he was calling.

12 THE COURT: The Court found he pretended he was
13 a customer, said he wanted to buy something or deal with
14 a local office, didn't he?

15 MR. LAYTON: That's right.

16 THE COURT: That's a lie. Lawyers aren't supposed
17 to lie.

18 MR. LAYTON: I think you will find in this case
19 the Court did not find that the attorney there had breached
20 anything other than what the Court said was a standard of
21 etiquette among members of the bar.

22 THE COURT: There was a dissent in that, if I
23 recall, and some suggestion that the Bar Association take
24 action in the majority opinion.

25 MR. KIRSCHNER: The majority said if you have

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a complaint, take it to the Bar Association.

THE COURT: It is not apposite to this case, in my view. The fellow lied in that case.

MR. KIRSCHNER: You have been served with the replacement page 12, Mr. Layton.

THE COURT: Hand up your papers and I will take the matter as fully submitted.

Decision is reserved.

The Court will be in recess.

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
W. T. GRANT COMPANY,

Plaintiff,

-against-

JOHN A. CHRISTENSEN, et al.,

Defendants.
-----X

75 Civ. 471 (CLB)

:
NOTICE OF MOTION
TO SETTLE RECORD
:
ON APPEAL

S I R S:

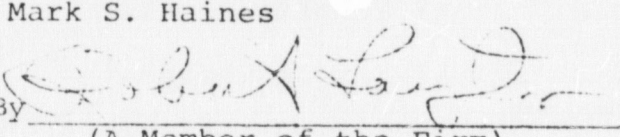
PLEASE TAKE NOTICE that, upon the annexed affidavit of Robert Layton, Esq., sworn to July 21, 1975, and the prior proceedings had herein, the undersigned will move this Court pursuant to Rule 10 of the Federal Rules of Appellate Procedure for an Order directing appellee, W. T. Grant Company, to submit the transcript of the interrogation of defendant Mark S. Haines, furnished to the District Court and referred to in its Opinion dated May 8, 1975, for inclusion as part of the record on appeal for the United States Court of Appeals for the Second Circuit, on the 29th day of July, 1975, at 11:00 A.M., in Room 706 of the United States Courthouse, Foley Square, New York, New York.

Dated: New York, New York
July 21, 1975.

Yours, etc.,

LAYTON and SHERMAN
Attorneys for Defendant
Mark S. Haines

TO: LIEBMAN, EULAU,
ROBINSON & PERLMAN
Attorneys for Plaintiff
32 East 57th Street
New York, N.Y. 10022

By 
(A Member of the Firm)

50 Rockefeller Plaza
New York, N. Y. 10020
(212) 586-4300

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
W. T. GRANT COMPANY,

Plaintiff,

: 75 Civ. 471 (CLB)

-against-

JOHN A. CHRISTENSEN, et al.,

: AFFIDAVIT

:
Defendants.
-----X

STATE OF NEW YORK)

: ss.:

COUNTY OF NEW YORK)

ROBERT LAYTON, being duly sworn, deposes and says:

1. I am a member of the Bar of this Court and the firm of Layton and Sherman, attorneys for defendant Mark S. Haines. Mr. Haines has noticed an appeal to the United States Court of Appeals for the Second Circuit from certain portions of the Order of the Honorable Charles L. Brieant, Jr., dated June 3, 1975.

2. In commencing to prepare the record of appeal therein, I have learned that the transcript of the recorded interrogation of January 31, 1975, which forms the substance of the appeal from the denial of our motion to disqualify counsel for plaintiff is not contained in the District Court files of this case.

3. On July 15, 1975, a pre-argument conference was held before Nathaniel Fensterstock, Esq., staff counsel to the

United States Court of Appeals. On that occasion, I requested counsel for W. T. Grant Company to furnish us with a copy of the transcript in question for inclusion in the record on appeal. Mr. Fensterstock indicated that he would like that request complied with by July 18, 1975 or to receive a written explanation for the refusal to comply with that request.

4. The request was not complied with and we are in receipt today of a copy of a letter to Mr. Fensterstock dated July 15, 1975 with certain enclosures, all of which are annexed hereto as Exhibit "A".

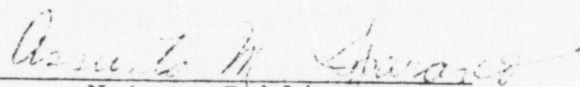
5. The thrust of the refusal is that the transcription was submitted to the court allegedly in camera and that since the District Court made no direction that the transcript be made available to counsel for Mr. Haines, and that the Court of Appeals has not yet made such direction, counsel for W. T. Grant Company respectfully decline to make said copy available for inclusion in the record on appeal.

6. For the above reasons, counsel for Mr. Haines have no choice but to seek a direction from the Honorable District Court for production of the transcript in question. Rule 10(e) of the Federal Rules of Appellate Procedure makes plain that the record shall truly disclose what occurred in the District Court and that anything material to either party should not be omitted from the record. Here, the most material information available -- a transcript of the actual interrogation of Mr. Haines -- was submitted to the District Court and indeed the District Court quoted a portion of that transcription in its Memorandum Decision

(page 20) dated May 8, 1975. It is of the essence of the appeal herein that all of the materials before the District Court be before the Court of Appeals and no reason appears why such materials be treated in a non-public manner.


ROBERT LAYTON

Sworn to before me this
21st day of July, 1975.


Notary Public

ASSUNTA M. SPARANO
Notary Public, State of New York
No. 24-377775
Qualified in Kings County
Commission Expires March 30, 1977

LAW OFFICES OF

LIEBMAN, EULAU, ROBINSON & PERLMAN

WALTER H. LIEBMAN (1931-1963)

MILTON R. EULAU
HERBERT ROBINSON
JULIAN S. PERLMAN
ALLAN J. KIRSCHNER
STANLEY S. LEFFLER
JOEL M. RUDELL
LAWRENCE M. ROSENSTOCK
LEONARD DORAN
ROBERT KRUGER
JEFFREY I. KLEIN

LOUIS P. EISNER
LEWIS M. DARNLEY, JR.
COUNSEL

32 EAST 57TH STREET
NEW YORK, N. Y. 10022

212 ELDORADO 5-5522
CABLE ADDRESS
"STATUTE NEW YORK"

July 15, 1975

Robert Layton, Esq.
Layton & Sherman
30 Rockefeller Plaza
New York, New York 10020

Re: W. T. Grant v. Christensen, et al.
Index No. 75 Civ. 471

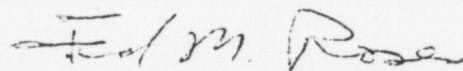
Dear Mr. Layton:

Enclosed herewith please find my letter of this date addressed to Nathaniel Fensterstock, Esq. and the enclosure therewith. As the aforesaid letter indicates, at the time of the pre-argument conference in the above-entitled matter, I was not aware that the transcript of the interview of defendant Haines' recorded conversation of January 31, 1975 had been submitted to the Court as an in camera exhibit.

Accordingly, our position remains as stated in my letter to Mr. Fensterstock.

I apologize for any confusion caused by my oversight of this matter.

Very truly yours,



Ted M. Rosen
For LIEBMAN, EULAU, ROBINSON & PERLMAN

TMR:ft
Enc.

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EXHIBIT "A"

LIEBMAN, EULAU, ROBINSON & PERLMAN
32 EAST 57TH STREET
NEW YORK, N. Y. 10022

July 15, 1975

Nathaniel Fensterstock, Esq.
Staff Counsel
U.S. Court of Appeals
Second Circuit
U.S. Courthouse
Foley Square
New York, New York 10008

Re: W. T. Grant Company vs.
John Christensen, et al.
Index No. 75 Civ. 171

Dear Sir:

Upon returning to my office this afternoon after the pre-argument conference of this date in the above-entitled matter, I reviewed the relevant files to ascertain the circumstances regarding whether the transcript of defendant Haines' recorded conversation of January 31, 1975, had been made available to the Court and other counsel in this litigation. As is evident from paragraph 5 of the affidavit of Allan J. Kirschner, sworn to the 9th day of April, 1975, submitted in opposition to defendant (appellant) Haines' motion to dismiss this action or disqualify plaintiff's counsel (a copy of said paragraph is enclosed herewith), the transcript had been submitted to the court for its in camera review. That the transcript had been so submitted is further confirmed by page 20 of the memorandum decision of May 8, 1975 by the Hon. Charles L. Brieant, Jr. wherein the transcript is referred to as an "in camera" exhibit. (A copy of said page is enclosed herewith.)

Although I was fully familiar with the papers and proceedings in regard to the present appeal, I inadvertently overlooked that these transcripts had been submitted to the District Court for its in camera review and I accordingly did not relate this fact at the conference earlier today. I apologize

LIEBMAN, EULAU, ROBINSON & PERLMAN
32 EAST 57TH STREET
NEW YORK, N. Y. 10022

Nathaniel Fensterstock, Esq.

July 15, 1975

for this oversight on my part, and regret any confusion
caused thereby.

As is clear from the affidavit of Mr. Kirschner referred to
above, and from Mr. Kirschner's letter of April 16, 1975
(a copy of which is enclosed), we have indicated in the
past that we will adhere to the direction of the District
Court in regard to making this transcript available to
counsel for the other parties. Of course, we certainly
will adhere to any ruling of the Court of Appeals in regard
to this transcript. However, in view of the fact that there
has been no direction by the District Court or Court of
Appeals as of yet in regard to this question, we respectfully
decline at this time to make available copies of the
transcript to counsel for Mr. Fensterstock since we have no basis
therefore.

Very truly yours,

Fel M. Rosen

Fel M. Rosen
For LIEBMAN, EULAU, ROBINSON & PERLMAN

TMR:ft
Enc.

cc.: Robert Layton, Esq.
Layton & Sherman
30 Rockefeller Plaza
New York, New York 10020

5. At no time during this conversation or the subsequent conversation which took place that afternoon for another half hour or 45 minutes were any promises of any kind made to Haines by me or anyone in my presence. Moreover, Haines was never threatened in any way. In fact, during one point of our conversation, Haines stated that he didn't like an inference that I was drawing. I told him that I was there to find out whatever facts I could in connection with the facts that came to Grant's attention and that if he wanted to say or add anything at any time he should do so. I made it clear that I was seeking to obtain the truth concerning his transaction with the Waits defendants and other developers. A copy of the transcripts of Haines' recorded conversation that I participated in will be given to the court for its in camera review. We, of course, will adhere to the Court's direction with respect to those transcripts. The original tape cassette recordings of those interviews are locked in our vault in our bank and can also be made available to the Court should it so desire. The tapes were transcribed by Management Safeguards, Inc. Since I am not an expert in tape recordings I did not even play back any tape at any time.

6. During that interview I asked Haines questions concerning the receipt by him of payments from John Waits and associations

February 24, 1966), dealt with the question of "attorney interviewing and taking a statement from an adverse party who he may reasonably expect will retain counsel but is not represented."

The Committee therein states:

"... we do not feel that there is anything unethical in the attorney for a potential plaintiff interviewing the potential defendant, and taking his statement, if the attorney advises the potential defendant witness that he is conducting the interview and attempting to take the statement in his position as attorney for the claimant."

Here there was an apparent attempt to mislead in that the attorney implied that there was uncertainty as to whether Haines would be sued, and a possibility that Haines might be able to exculpate himself and keep his job. In the attorneys words:

"If you have any additional information which you think would help us, tell us that. We'd like to be able to clear your name from this if that's possible. There's two things, one, give us any other information that you can. Two, give us authority to do further checking into you and your relationship with Mr. Waits." [Emphasis added-quoted from in camera exhibit referred to at p.3 of the affidavit of Allan J. Kirschner, Esq., sworn to April 9, 1975.]

This Court is satisfied upon all it has heard that nothing

April 10, 1975

BY HAND

Honorable Charles L. Brieant, Jr.
United States District Judge
United States District Court
Foley Square
New York, New York

Re: Grant v. Christensen, et al.
75 Civ. 471

Honorable Sir:

In accordance with paragraph 5 of my affidavit sworn to April 9, 1975 in opposition to defendant Haines' motion which is returnable before you on April 14, 1975, enclosed are copies of the transcript of the conversations that I had with Haines on January 31, 1975. Copies of this statement have not been furnished to opposing counsel and we will, of course, adhere to whatever direction Your Honor makes with respect thereto.

Respectfully yours,

Allan J. Kirschner
for LIEBMAN, EULAU, ROBINSON & PERLMAN

AJK:fm
Encs.

CC: To all counsel

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

ASSUNTA M. SPARANO, being duly sworn, deposes and says:

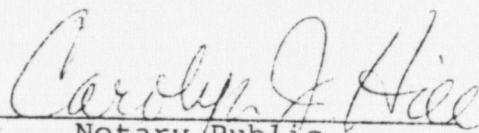
That deponent is not a party to the action, is over 18 years of age and resides in Brooklyn, New York; that on the 21st day of July, 1975, deponent served the within Notice of Motion to Settle Record on Appeal and Affidavit of Robert Layton, Esq. upon:

LIEBMAN, EULAU, ROBINSON & PERLMAN
Attorneys for Plaintiff
32 East 57th Street
New York, New York 10022

the address designated by said attorneys for that purpose by depositing same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.


ASSUNTA M. SPARANO

Sworn to before me this
22nd day of July, 1975.


Notary Public

CAROLYN J. HILL
Notary Public, State of New York
No. 31-6397070
Qualified in New York County
Commission Expires March 30, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
W. T. GRANT COMPANY, :
Plaintiff, : 75 Civ. 471 (CLB)
-against- : AFFIDAVIT
JOHN A. CHRISTENSEN, et al., :
Defendants. :
----- x

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

TED M. ROSEN, being duly sworn, deposes and says:

1. I am a member of the Bar of this Court and am associated with Liebman, Eulau, Robinson & Perlman, attorneys for plaintiff-appellee, W. T. Grant Company ("Grant"). I submit this affidavit in opposition to defendant-appellant Mark S. Haines' ("Haines") motion for an order directing Grant to submit the transcript of Haines' conversations with an attorney of this firm on January 31, 1975 ("the transcript") for inclusion as part of the record on appeal for the U.S. Court of Appeals for the Second Circuit.

2. Grant opposes the present motion on the grounds that (a) said motion is in reality an attempt at discovery, which

is premature and (b) this Court did not grant such relief in its decision and reargument is now untimely. Additionally, Grant opposes the present application because it is unnecessary to accomplish its stated objective: to insure that all materials that were before the District Court be before the Court of Appeals.

3. The objective sought by Haines counsel - to have before the Court of Appeals all materials that were before the District Court - may be readily achieved without disclosure of the transcript to Haines, by the transcript remaining as an in camera exhibit. The Court of Appeals would then be able to review the transcript and have before it all materials that were before District Court.

4. Haines attempt to obtain a copy of the transcript by means of this motion is as indicated, supra, in paragraph 2 improper as an attempt at discovery; and also is improper as an attempt to reargue the decision of this Court dated May 8, 1975 which did not direct the production of the transcript to Haines. As such, the present motion is untimely under Rule 9(m) of the Rules of this Court.

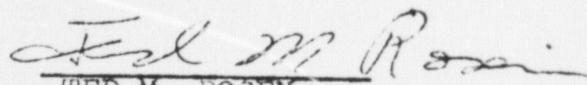
5. By means of several orders, this Court, per the Honorable Charles L. Brieant Jr., District Judge, has stayed plaintiff from pursuing discovery of various defendants in this litigation including defendant Haines. At a hearing held before

Judge Brieant on June 23 1975, Judge Brieant continued the stay of discovery against Haines, pending the present appeal. As a result, Grant has not yet taken the examination before trial of defendant Haines although Grant tried to obtain an order permitting the taking of discovery prior to the expiration of thirty (30) days from the commencement of this action.

6. As the accompanying memorandum of law shows, whether or not Haines may ultimately inspect the transcript, Grant has the right to examine Haines under oath before allowing Haines to examine said transcript.

7. I respectfully and regrettably submit that Haines' counsel's disclosure in his moving papers of discussions held during the pre-argument conference of July 15, 1975 is highly improper. As Haines' counsel is aware, such pre-argument conferences are confidential. (See New York Law Journal Article entitled "Civil Appeals Management Plan" annexed hereto as Exhibit A). I submit that counsel could have stated the issue involved in this motion, without disclosing, as he has, the contents of the pre-argument conference and without violating his agreement to keep said discussion confidential.

8. For the foregoing reasons, I respectfully request that the motion by Haines be denied in all respects.


TED M. ROSEN

Sworn to before me this _____ New York
28th day of July, 1975
Quadrone, New York County
Commission Expires March 30, 1977

PROCEDURE for APPEALS FROM DISTRICT COURT

Obermayer, Paul K. Rooney, Robert K. Rosen, Linda J. Silberstein, Henry P. Wasserstein, Stephen A. Weiner and James [illegible]

Civil Appeals Management Plan

Following filing of a notice of appeal, the Clerk of the District Court transmits a copy of the notice of appeal to the Clerk of the Court of Appeals (Local Rule 3(d)). The Clerk of the District Court will also furnish appellant with two forms, a Form C entitled Civil Appeal Pre-argument Statement and a Form D entitled Transcript Information Civil Appeal.

Form C, which requests information as to the nature of the action, the method of disposition in the District Court and the issues proposed to be raised on the appeal, must be filed by the appellant with the Clerk of the Court of Appeals, and served on the other parties to the action, within ten days of the notice of appeal has been filed. Form D, which requests information relating to the preparation of the transcript necessary for the prosecution of the appeal, must be completed by counsel for appellant within ten days after the filing of the notice of appeal, with one copy of the form to be filed with the Clerk of the Court of Appeals, two copies to be furnished to the court reporter, and one copy to be served on counsel for the appellee. Forms C and D are required to be served and filed as above indicated whether the appeal is an appeal or cross-appeal.

Docket Fee

In addition to the completion and filing of Forms C and D, appellant must also pay to the Clerk of the Court of Appeals the \$50 docket fee prescribed by law within the same ten day period.

The appeal is subject to dismissal if the appellant fails to file Forms C and D and pay the docket fee within the prescribed time. Accordingly, the timely completion and filing of such forms, and the payment of the docket fee, should be given careful attention by counsel for appellant.

Upon the filing of Forms C and D, the staff counsel of the court will issue, and the Clerk will send to counsel for the parties, the civil appeal scheduling order. This order will specify the date by which the record on appeal shall be filed, the date by which the appellant's brief and joint appendix shall be filed, and the date by which appellee's brief shall be filed. The order will also provide that argument of the appeal shall be ready to be heard during a specified week. The order will also contain provisions that the appeal shall be dismissed forthwith in the event of default by appellant in meeting the obligations imposed upon him by the order, and that appellee shall be subjected to appropriate sanctions if he fails to file his brief within the time directed by the order.

Filing Period

The civil appeal scheduling order will normally provide for the filing of the record on appeal within forty days after the date of the notice of appeal, the filing of appellant's brief and the joint appendix forty days thereafter, and the filing of appellee's brief thirty days thereafter. (Under F. R. App. P. 31(a) appellant's reply brief must be served within fourteen days after service of appellee's brief or three days before the argument, whichever date is earlier.)

In the event that the record on appeal cannot be filed within the time specified in the civil appeal scheduling order because of delays in preparation of the transcript or other reasons beyond appellant's reasonable control, an appropriate modification may be made of the order, or the Clerk of the Court may permit the filing of a supplementary record subsequent to the filing of the portions of the record which are available on the date specified in the order.

Notice of Conference

At or about the time that the civil appeal scheduling order is issued, or at any time thereafter, the staff counsel of the court may by a telephone call direct the attorneys to attend a pre-argument conference to be held before him at a specified time. The purpose of this conference is to consider the possibilities of settlement, the simplification of issues to be determined on the appeal (prior to the preparation of briefs), and any other matters which in the judgment of staff counsel are appropriate for discussion.

The staff counsel will make

the determination as to whether or not the case is appropriate for a pre-argument conference on the basis of his study of Forms C and D, and a copy of the docket sheet of the District Court. Such a conference will normally be held in a private action seeking a monetary judgment, and in other actions which, in the judgment of staff counsel, seem susceptible to settlement or simplification of issues.

The result of the pre-argument conference may be the entry of a pre-argument conference order, which may include an appropriate modification of the scheduling order. The conference itself is completely confidential, and except for the contents of the pre-argument conference order, no report on the discussion during the conference is furnished by staff counsel to any member of the court, other than that a pre-argument conference was held and what was the disposition.

(1) One of the major reasons for the success of the plan is the reference by the court with the consent of counsel. See *DeLoe v. Board of Education*, 100 F.2d 1021, a comprehensive investigation and hearing case ruled by the parties with the aid of the Staff Counsel after years of litigation and following argument before the court.

(2) Of six categories of civil filings in the Court of Appeals, three (private civil, U. S. civil and bankruptcy) were considered appropriate for pre-argument conferences. Cases in the categories of prisoners' appeals, administrative appeals and original proceedings were not. Between July 1, 1974 and May 31, 1975, 775 cases were filed in the three categories that were eligible for conferences and 847 were terminated. 377 cases (and 500 conferences) were held, resulting in 279 settlements or dispositions not involving any action or intervention by a circuit judge. The proportion of settlements to filings was thus 25.95 per cent.

Another illustration: there were 882 total cases (all types) pending on the Second Circuit docket as of July 1, 1975, and 377 as of May 31, 1975. In the same time, 1,533 cases (all types) were filed and 1,593 were terminated. Thus, the court stayed even in its dockets. The achievement becomes notable when the private civil category is examined. Of the 882 total cases pending as of July 1, 455 were in the private civil category. Of the 377 total cases that were pending as of May 31, 1975, only 246 were in the private civil category. It was because of dramatic reduction in the level of private civil cases, substantially accomplished by the Staff Counsel utilizing C. A. M. P. procedures, that the court accomplished its objective of maintaining the level of its dockets.

(3) See, for example, *Lopez v. Cole*, Docket No. 75-7217, a pressure-filled civil rights case pitting the Puerto Rican community of Bridgeport against the Chief of Police, which the Staff Counsel expertly brought around to a generally accepted settlement.

(4) In at least one case, such understanding would have precluded considerable disappointment to counsel for one side when the Court determined a matter quite differently from the determination predicated by Staff Counsel.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

W. T. GRANT COMPANY,

Plaintiff,

-against-

JOHN A. CHRISTENSEN, MAVIS CHRISTENSEN,
MARK S. HAINES, DANIEL QUINLAN, JOHN W.
WAITS, JOHN W. WAITS, doing business as
JOHN W. WAITS ASSOCIATES, JWW, INC.,
CENTURION DEVELOPMENT CORPORATION,
CENTURION OF LOUISIANA, INC.,
MID-AMERICA DEVELOPMENT, DEVELOPMENT
CORPORATION OF MID-AMERICA, INC.,
UMBAUGH POLE BUILDING COMPANY, INC.,
also known as UMBAUGH CO., FRONTIER
DEVELOPMENT CORPORATION, JOHN DOES
I THROUGH X, the names being fictitious,
the true names of said defendants being
unknown to plaintiff at the present
time,

Defendants.

75 Civ. 471 (CLB)

ORDER

Upon reading and filing the affidavit of Lawrence M. Rosenstock, sworn to the 11th day of February, 1975 and upon exhibits annexed thereto and upon all the prior papers and proceedings heretofore had in this action and for good cause shown, it is, on motion of Liebman, Eulau, Robinson & Perlman, attorneys for plaintiff W. T. GRANT COMPANY,

ORDERED that:

1) Defendant JOHN A. CHRISTENSEN be required to appear for oral deposition at the offices of Liebman, Eulau, Robinson &

Exhibit B

-312-

Perlman, 32 East 57th Street, New York, New York on the 25th day of February, 1975 at 10:30 o'clock A.M.

2) Defendant MAVIS CHRISTENSEN be required to appear for oral deposition at the offices of Liebman, Eulau, Robinson & Perlman, 32 East 57th Street, New York, New York on the 26th day of February, 1975 at 10:30 o'clock A.M.

3) Defendant MARK S. HAINES be required to appear for oral deposition at the offices of Liebman, Eulau, Robinson & Perlman, 32 East 57th Street, New York, New York on the 27th day of February, 1975 at 10:30 o'clock A.M.

4) Defendant DANIEL QUINLAN be required to appear for oral deposition at the offices of Liebman, Eulau, Robinson & Perlman, 32 East 57th Street, New York, New York on the 28th day of February, 1975 at 10:30 o'clock A.M.

5) Defendant UMBAUGH POLE BUILDING COMPANY, INC., also known as UMBAUGH CO., be required to appear for oral deposition at the offices of Liebman, Eulau, Robinson & Perlman, 32 East 57th Street, New York, New York on the 3rd day of March, 1975 at 10:30 o'clock A.M.

6) Defendant JOHN W. WAITS be required to appear for oral deposition at the offices of Liebman, Eulau, Robinson & Perlman, 32 East 57th Street, New York, New York on the 4th day of March, 1975 at 10:30 o'clock A.M.

Dated: New York, New York
February 11, 1975

51
U.S.D.J.

5/14/75

-313-

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

W. T. GRANT COMPANY,

Plaintiff,

-against-

JOHN A. CHRISTENSEN, MAVIS CHRISTENSEN,
MARK S. HAINES, DANIEL QUINLAN, JOHN W.
WAITS, JOHN W. WAITS, doing business as
JOHN W. WAITS ASSOCIATES, JWW, INC.,
CENTURION DEVELOPMENT CORPORATION,
CENTURION OF LOUISIANA, INC.,
MID-AMERICA DEVELOPMENT, DEVELOPMENT
CORPORATION OF MID-AMERICA, INC.,
UMBAUGH POLE BUILDING COMPANY, INC.,
also known as UMBAUGH CO., FRONTIER
DEVELOPMENT CORPORATION, JOHN DOES
I THROUGH X, the names being fictitious,
the true names of said defendants being
unknown to plaintiff at the present
time,

Defendants.

75 Civ. 471 (CLB)

AFFIDAVIT

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

LAWRENCE M. ROSENSTOCK, being duly sworn, deposes and
says:

1) I am an attorney associated with the firm of
Liebman, Eulau, Robinson & Perlman, attorneys for the plaintiff
W. T. GRANT COMPANY, and am fully familiar with the facts herein-
after recited.

2) I submit this affidavit in support of plaintiff's

Exhibit C

-314-

Sworn to before me, this

day of

AFFIDAVIT OF PERSONAL SERVICE

application pursuant to Rule 30(a) of the Federal Rules of Civil Procedure to obtain leave of court which may be granted without notice, to take the depositions of defendants JOHN A. CHRISTENSEN ("Christensen"), MAVIS CHRISTENSEN ("M. Christensen"), MARK S. HAINES ("Haines"), DANIEL QUINLAN ("Quinlan"), UMBAUGH POLE BUILDING COMPANY, INC., also known as UMBAUGH CO. ("Umbaugh") and JOHN W. WAITS ("Waits"), prior to the expiration of 30 days after the service of the Summons and Complaint in this action, and at the times and places referred to in the proposed Order submitted on this application.

3) This is an action for fraud, deceit, conflict of interest, conversion, conspiracy, and violation of anti-trust laws of the United States based upon the payment and receipt of various kickbacks of several hundred thousand dollars with respect to leases negotiated and entered into on behalf of the plaintiff. Specifically, the Complaint alleges that Waits and various corporations he dominated and controlled paid various types of kickbacks and commissions to high officials of plaintiff's Real Estate Department for the purpose of entering into and obtaining leases with plaintiff. The making and receipt of payments have been documented by various checks and statements of witnesses and by admissions made by the individual defendants themselves, who conceded that they received various monies and gifts from Waits for the purpose of influencing their conduct on behalf of plaintiff.

A copy of the Complaint in this action is annexed hereto as Exhibit A.


4) The detailed facts upon which this action is based and the documentary evidence referred to above are included within an order to show cause for an attachment and a permanent injunction previously filed with this Court, and the Court is respectfully referred to that order to show cause and the facts recited therein. As these facts conclusively demonstrate, not only have acts of commercial bribery been committed on a massive scale, but it is very probable that violations of criminal statutes relating to commercial bribery and the anti-trust laws have occurred as well.

5) Revelation of these kickbacks and the dismissal of the various individual defendants from plaintiff's employ has resulted in considerable publicity in the New York Times, the Wall Street Journal, and Women's Wear Daily. It is therefore quite apparent that the named defendants, as well as others who conspired with these defendants and who are presently unknown, may now be attempting to destroy evidence which could be crucial to this action. Additionally, it is imperative that plaintiff initiate discovery as soon as possible in order for plaintiff to conduct a full inquiry into the massive fraud committed by the defendants and to ascertain in what other ways it has been defrauded and damaged. Furthermore, since plaintiff may well be incurring substantial additional damages at the very moment by

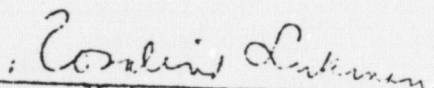
reason of the fraud perpetrated by these defendants, it is essential that these depositions be held as soon as possible.

6) There can be no possible prejudice to the defendants by the granting of this application. Defendants Christensen, Haines, Quinlan and Umbaugh were all served on January 31, 1975 and defendant M. Christensen acknowledged service on February 3, 1975. All these defendants have obtained counsel and have made either a special or general appearance in this action as of February 7, 1975. Additionally, defendant Waits is in the process of being served and he has had counsel communicate with plaintiff's attorneys on his behalf. Consequently, all these defendants are fully represented and all their rights will be fully protected at deposition.

7) For the foregoing reasons, it is respectfully requested that plaintiff's application be granted in all respects, no previous application for such relief having been requested.


LAWRENCE M. ROSENSTOCK

Sworn to before me this
11th day of February, 1975.


Notary Public

ROBERT L. LUKIAN
Notary Public, State of New York
Qualified in New York County
Commission Expires March 30, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
W. T. GRANT COMPANY, :

Plaintiff, :

-against- :

JOHN A. CHRISTENSEN, MAVIS CHRISTENSEN, :
MARK S. HAINES, DANIEL QUINLAN, JOHN W. :
WAITS, JOHN W. WAITS, doing business as :
JOHN W. WAITS ASSOCIATES, JWW, INC., :
CENTURION DEVELOPMENT CORPORATION, :
CENTURION OF LOUISIANA, INC. :
MID-AMERICA DEVELOPMENT, DEVELOPMENT :
CORPORATION OF MID-AMERICA, INC., :
UMBAUGH POLE BUILDING COMPANY, INC., :
also known as UMBACH CO., FRONTIER :
DEVELOPMENT CORPORATION, JOHN DOES :
I THROUGH X, the names being fictitious, :
the true names of said defendants being :
unknown to plaintiff at the present :
time, :

75 Civ. 471 (CLB)

Defendants.:
----- x

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ALLAN J. KIRSCHNER, being duly sworn, deposes and says:

1. I am a member of Liebman, Eulau, Robinson & Perlman, attorneys for plaintiff in this action and submit this affidavit in opposition to the orders to show cause of (1) John A. Christensen ("Christensen") and Mavis Christensen, ("M. Christensen") (hereinafter sometimes referred to jointly as the "Christensens") and (2) Mark S. Haines ("Haines") for protective orders, either staying or vacating plaintiff's

notices to take their depositions served pursuant to an order of this court entered February 14, 1975. Because both motions were served Friday afternoon, February 21, 1975, and were made returnable Monday afternoon, February 24, 1975, this affidavit is submitted in opposition to both motions.

APPLICATION OF CHRISTENSEN AND M. CHRISTENSEN TO ADJOURN
THEIR DEPOSITIONS

2. Christensens' attorney's affidavit submitted in support of Christensen's and M. Christensen's application for an adjournment attempts to obfuscate the only issue before the court i.e. whether or not an adjournment of the deposition should be granted, by relating in detail the history of this action and of a pending action in the United States District Court for the District of Connecticut. None of these facts have any relevance to the propriety of plaintiff taking Christensen's and M. Christensen's deposition and are apparently brought forth in an attempt to cloud the fact that Christensen and M. Christensen have failed to show in any manner how they can be prejudiced by the taking of their depositions.

3. Both Christensens appeared in this action on February 3, 1975 and on or about February 13, 1975 they served their answer to plaintiff's complaint. A copy of this answer

is annexed hereto as Exhibit A. Significantly, this answer does not in any way dispute the jurisdiction of this court or question the propriety of service upon Christensen or M. Christensen. They are, therefore, fully represented by counsel and in fact have had ample opportunity to consult with counsel since an answer has already been submitted on their behalf.

4. As demonstrated in plaintiff's accompanying memorandum of law, the only reason why leave of court is required for plaintiff to take defendants' deposition prior to the expiration of thirty days after the service of the summons and complaint is to permit a defendant to examine the allegations of the complaint and to obtain counsel. There is absolutely no suggestion whatsoever in Christensens' attorney's affidavit that the Christensens have not had this opportunity.

5. Furthermore, under Rule 30 of the Federal Rules of Civil Practice, plaintiff may freely take a defendant's deposition after the expiration of thirty days after service of the summons and complaint. Since Christensen was admittedly served in this action on January 31, 1975 and M. Christensen voluntarily appeared in this action on February 3, 1975, it is clear that plaintiff could take their depositions on March 3, 1975 and March 6, 1975 respectively without leave of court. Consequently, the fact that the depositions are scheduled for a few days prior to this time cannot in any sense

prejudice them particularly since they have been fully represented by counsel as of February 3, 1975 and submitted their answer as of February 13, 1975.

6. The Christensens' moving affidavit on the present motion refers to the fact that there is presently pending in the United States District Court for the District of Connecticut a motion to dismiss, enjoin or transfer that action to this court. That action was initiated by plaintiff against the Christensens (but not the other defendants named in this action) in order to obtain certain relief with respect to property owned by the Christensens which are located in Connecticut. The fact that the Christensens have now moved to dismiss, enjoin or transfer this Connecticut action, however, can have no bearing with respect to the propriety of plaintiff taking the Christensens' depositions in the New York action. Indeed, as noted above, the Christensens have not challenged the legitimacy of the New York action and no objection^{to}/the court's jurisdiction has been raised in the Christensens' answer.

7. The court should also be advised that the Connecticut action was instituted because plaintiff ascertained that the Christensens were attempting to secrete their assets in Connecticut even though they made a representation to this

court on the return date of the plaintiff's application for an attachment, that they would not sell, transfer or dispose of their assets.*

8. The Christensens also suggest that plaintiff delayed in serving its notice to take deposition upon them. This is also completely incorrect. The court's order was signed on Friday, February 14, 1975. Since Monday, February 17, 1975 was Washington's birthday, this office as well as Christensens' attorney's office was closed. Consequently, the notice to take deposition was not served until February 18, 1975, the first business day following the signing of the court's order. A copy of this order and the affidavit upon which it was granted are annexed hereto as Exhibits B and C, respectively.

9. As the affidavit submitted in support of the order granting plaintiff the right to take the Christensens' depositions indicates, the procedure followed by plaintiff is explicitly

* Plaintiff has ascertained that immediately after this representation was made, M. Christensen withdrew approximately \$45,000 from bank accounts maintained by the Christensens in Connecticut.

sanctioned by Rule 30 (a) of the Federal Rules of Civil Procedure.

10. The order of show cause and exhibits annexed to the Rosenstock affidavit in support of this order conclusively demonstrated that the Christensens received numerous kickbacks bribes and commissions from real estate developers and have perpetrated major frauds upon plaintiff who was Christensen's employer. Consequently, it is essential for plaintiff, as soon as it is able, to take the Christensens' depositions to ascertain the extent of such fraud and to prevent it from being further damaged and defrauded as a result of other wrongful acts committed by the Christensens which have not yet been uncovered. Since, as demonstrated above, the Christensens will not be prejudiced in any way by the taking of such depositions, there is no need for a protective order and the Christensens' application should be denied in all respects.

APPLICATION OF HAINES FOR A
STAY OF HIS DEPOSITION AND
A PROTECTIVE ORDER.

11. Haines' application, as the Christensens, also attempts to divert the court from the fact that Haines will not be prejudiced in any manner by the taking of his deposition.

Haines, as Christensen, was served with a summons and complaint in this action on January 31, 1975 and appeared in court through counsel on February 3, 1975. Consequently, no claim is made that Haines has not had ample opportunity to examine the complaint or to obtain full and knowledgeable legal representation to defend his interests in this action. Since as explained above and in the affidavit submitted in support of the order granting plaintiff the right to take Haines' and the Christensens' depositions, it is imperative that plaintiff depose these defendants to ascertain the extent of the fraud perpetrated upon it and to prevent it from being further damaged, no reason exists for granting Haines a protective order.

12. Haines' attorney asserts that plaintiff has engaged in a "wholesale press campaign designed to divert public attention from the \$175,000,000 loss incurred by W. T. Grant Company . . . ," and that for this reason Haines is entitled to a protective order. This is a complete non-sequitor. Even assuming arguendo, this assertion was correct (which it most certainly is not), this would not in any sense justify the granting of a protective order with respect to the taking of Haines' deposition. Obviously, the publicity this case receives cannot in any sense prejudice Haines' rights at such a deposition.

13. Furthermore, Haines' assertion that a wholesale press campaign is being waged by plaintiff or plaintiff's counsel is totally false. The complaint in this action is a matter of public record and since plaintiff is a large publicly owned company and the fraud perpetrated by Haines and the other defendants is of such a massive proportion, it is quite natural that the matters involved in this action would be widely reported in the press.

14. Haines' attorney's suggestion that plaintiff's counsel as well as plaintiff is waging such a campaign is likewise completely erroneous and represents a scandalous accusation by Haines' attorney to divert the court from the fact that Haines' application is without merit. This firm never has, does not and would not advertise. Indeed, the news articles referred to in Haines' attorney's affidavit describing this action did not even mention the name of plaintiff's attorney's law firm.

15. Furthermore, contrary to Haines' attorney's accusation, Herbert Robinson of this firm did not arrange for himself to be interviewed by the New York Times, but was requested by the Times to grant an interview on the general subject of commercial bribery because of the substantial

coverage which the instant case received in the media. Indeed, as the article relating to Mr. Robinson's interview indicates, plaintiff's name was not even mentioned except in a passing reference and none of the defendants' names were mentioned. Thus, there is absolutely no basis to Haines' attorneys claim that plaintiff's counsel is conducting a press campaign against Haines or are prejudicing his rights.

16. Furthermore, Herbert Robinson is a nationally known expert in the field of commercial bribery and has frequently lectured on the subject before lawyers, bankers and real estate associations throughout the country.* It is therefore quite natural that the New York Times would be interested in interviewing Mr. Robinson with respect to commercial bribery and the role it plays in the economy.

17. There is absolutely no basis to support plaintiff's request that some type of injunction be issued with respect to the issuance of press releases and the holding of press conferences. There has been no showing of impropriety on the part of plaintiff or plaintiff's counsel. It is unquestioned that

*Mr. Robinson is presently out of the country and accordingly is unable to submit his own affidavit to refute the unsubstantiated charges raised in Haines' attorneys affidavit. However, if the court deems it necessary, Mr. Robinson will submit his own affidavit upon his return to the country at the beginning of next week.

all the facts that have been reported in the papers have been a matter of public record and that such facts are available to any reporter who cares to requisition the file in this matter and to report the facts contained in the papers in that file.

18. Haines' attorney also suggests that questions possibly exist as to the propriety of the court's jurisdiction and of the manner in which Haines was served. However, no claim is raised in the present motion attacking the court's jurisdiction. Indeed, since Haines himself has not even submitted an affidavit on the present application, Haines' attorneys reference to possibly defects in the court's jurisdiction which may be raised at a later time, constitute, at most, hearsay conclusions made without any supporting facts and can have no possible bearing on the propriety of the taking of Haines' deposition.

19. Furthermore, I myself personally served the summons and complaint upon Haines at plaintiff's office. Thus, there can be no doubt that jurisdiction was properly obtained over Haines since Haines was employed by plaintiff and maintained an office at plaintiff's place of business in New York City where he was served. Accordingly, Haines' attorneys' suggestion that Haines might at a later time claim that he was improperly served is completely without validity.

20. Haines' attorney also alleges that he believes certain statements and admissions were obtained from Haines improperly; that tape recordings were taken of his statements and that he was subjected to polygraph tests where additional admissions were obtained. Significantly, however, no affidavit is submitted by Haines himself specifying any facts upon which Haines' attorneys hearsay assertions are based.

21. The fact is that the statements and admissions obtained from Haines were perfectly proper. These statements were requested by representatives of plaintiff, Haines' employer, to ascertain whether there was any basis to the charges being made against Haines and to discover the extent of Haines' fraudulent conduct. Certainly Haines would not suggest that his own employer is not entitled to question him with respect to such activity and to determine whether or not fraudulent acts were committed by Haines and the extent of such acts.

22. Furthermore, all of Haines' statements were made voluntarily and he was informed prior to his interview that notes would be taken of his statements and that his conversation with plaintiff and plaintiff's counsel was being tape recorded. Instead of objecting to the procedure Haines express relief that he could discuss the matter openly and voluntarily submitted to a lie detector test.

23. The existence of these statements cannot in any sense detract from the propriety of plaintiff taking Haines' deposition. This is particularly so since plaintiff has not even sought as yet to use such statements and admissions. Furthermore, as demonstrated in plaintiff's memorandum of law submitted with this affidavit, admissions made by Haines under these circumstances are perfectly proper. This is a civil action not involving any government agencies and there is no principle of law in any sense precluding the use of such admissions when made under these circumstances. This is particularly so in view of the fact that Haines' admissions fully corroborated the evidence plaintiff previously had collected demonstrating conclusively that Haines received substantial amounts of kickbacks and pay-offs with respect to leases he negotiated and approved on plaintiff's behalf.

24. Finally, Haines' attorney also suggests that this entire action should be stayed because there is a possibility that criminal activities might at some future time be initiated against Haines. As demonstrated in plaintiff's accompanying memorandum of law, this request is totally unfounded and without merit. The courts have long recognized that the fact that criminal actions might at some future time be instituted against a party will not in any sense preclude or stay the commencement

of a civil action to obtain monetary relief for the various wrongs committed by the defendant. This is particularly true in the present case since it is imperative that plaintiff fully examine Haines to ascertain the extent of his fraud and the extent to which plaintiff was fraudulently induced to enter into the various leases negotiated by Haines on plaintiff's behalf.

25. It is thus apparent that the various arguments raised by Haines cannot in any sense warrant the adjournment or staying of his deposition. Haines has been represented by counsel for several weeks now and has had ample opportunity to prepare himself for his deposition. Consequently, Haines' request for a protective order should be denied in all respects.

WHEREFORE, it is respectfully requested that the Christensens' and Haines' application be denied in all respects.

19
ALLAN J. KIRSCHNER

Sworn to before me this

24th day of February, 1975.

19

JEFFREY I. KLEIN
NOTARY PUBLIC, STATE OF NEW YORK
No. 41-2141160
Qualified in Queens County
Certificate filed in New York County
Term Expires March 30, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
W. T. GRANT COMPANY,

Plaintiff,

-against-

JOHN A. CHRISTENSEN, MAVIS CHRISTENSEN,
MARK S. HAINES, DANIEL QUINLAN, JOHN W.
WAITS, JOHN W. WAITS, doing business as
JOHN W. WAITS ASSOCIATES, JWW, INC.,
CENTURION DEVELOPMENT CORPORATION,
CENTURION OF LOUISIANA, INC., MID-AMERICA
DEVELOPMENT, DEVELOPMENT CORPORATION OF
MID-AMERICA, INC., UMBACH POLE BUILDING
COMPANY, INC., also known as UMBACH CO.,
FRONTIER DEVELOPMENT CORPORATION, JOHN
DOES I THROUGH X, the names being ficti-
tious, the true names of said defendants
being unknown to plaintiff at the pre-
sent time,

Defendants.
-----X

75 Civ. 471 - CLB

ANSWER

Defendants JOHN A. CHRISTENSEN and MAVIS CHRISTENSEN,
by their attorneys, Anderson Russell Kill & Olick, P.C., answer
plaintiff's Complaint as follows:

1. Admit the allegations contained in paragraphs 3,
4, 19 and 25.
2. Deny knowledge or information sufficient to form
a belief as to the truth of the allegations contained in para-
graphs 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 26, 28 and 68.

Exhibit A

- 331 -

3. Deny each and every allegation contained in paragraphs 18, 20, 21, 22, 23, 27, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 46, 47, 49, 50, 51, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 69, 70, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 89, 90, 91, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116 and 117.

4. Deny the allegations contained in paragraph 1 of the Complaint except admit that plaintiff purports to bring this action pursuant to the statutes referred to in said paragraph.

5. Deny the allegations contained in paragraph 2 of the Complaint except admit that defendant JOHN A. CHRISTENSEN had an office within the Southern District of New York.

6. Deny the allegations contained in paragraph 5 of the Complaint except admit that defendant MAVIS CHRISTENSEN is a resident of the State of Connecticut.

7. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 24 of the Complaint except admit that for a time defendant JOHN A. CHRISTENSEN was Real Estate Vice President of plaintiff.

8. With respect to the allegations contained in paragraphs 45, 48 and 52 of the Complaint, defendants JOHN A. CHRISTENSEN and MAVIS CHRISTENSEN repeat, reallege and make a part hereof as if more fully set forth herein at length all the corresponding allegations contained in paragraph 3 of this Answer.

9. Defendant MAVIS CHRISTENSEN denies each and every allegation contained in paragraphs 92, 93 and 94 of the Complaint.

10. With respect to the allegations contained in paragraph 16 of the Complaint, no allegations concerning defendants JOHN A. CHRISTENSEN or MAVIS CHRISTENSEN (or any other defendants) are contained therein and no issue is raised therein.

11. With respect to the allegations contained in paragraphs 71, 72, 73, 74, 75, 76, 87 and 88 of the Complaint, they are not addressed to either defendant JOHN A. CHRISTENSEN or MAVIS CHRISTENSEN and, therefore, no issue with respect to said defendants is raised thereby. However, defendant JOHN A. CHRISTENSEN denies ever having an employment contract with plaintiff and defendants JOHN A. CHRISTENSEN and MAVIS CHRISTENSEN deny knowledge or information sufficient to form a belief as to the truth of the remaining allegations thereof.

12. With respect to the allegations contained in paragraphs 92, 93 and 94 of the Complaint, they are not addressed to defendant JOHN A. CHRISTENSEN and, therefore, no issue with respect to said defendant is raised thereby. However, defendant JOHN A. CHRISTENSEN denies the allegations contained in paragraphs 92, 93 and 94 of the Complaint.

AS AND FOR A FIRST
AFFIRMATIVE DEFENSE

13. The Complaint fails to state a claim upon which relief can be granted.

AS AND FOR A SECOND
AFFIRMATIVE DEFENSE

14. Plaintiff cannot maintain any claims for injunctive relief because it has an adequate remedy at law.

AS AND FOR A THIRD
AFFIRMATIVE DEFENSE

15. This action is barred by the applicable statutes of limitations.

WHEREFORE, defendants JOHN A. CHRISTENSEN and MAVIS CHRISTENSEN respectfully request judgment dismissing the Complaint together with the costs and disbursements of this action, and such other and further relief as the Court deems just and proper.

Dated: New York, New York
February 13, 1975

ANDERSON RUSSELL KILL & OLICK, P.C.

By: 

A Member of the Firm
Attorneys for defendants
JOHN A. CHRISTENSEN and
MAVIS CHRISTENSEN
630 Fifth Avenue
New York, New York 10020
(212) 397-9700

Civil Action No. 75 Civ. 471 - CLB

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

W. T. GRANT COMPANY,

Plaintiff,

- against -

JOHN A. CHRISTENSEN, et al.,
Defendants.

ORDER TO SHOW CAUSE
FOR PROTECTIVE ORDER

LAYTON AND SHERMAN

Attorneys for Defendant

Mark S. Haines
(Office and Post Office Address)

50 ROCKEFELLER PLAZA BOROUGH OF MANHATTAN

NEW YORK, N. Y. 10020

(212) 586-4300

Copy received
LIEBMAN, EULAU, ROBINSON & PERLMAN

32 EAST 57TH STREET

NEW YORK, N. Y. 10022

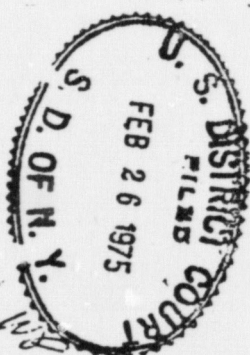
Attorney for Plaintiff
4 PM 2/24/75

FEB 24 1975

*Deposition of defendants Haines and
White et al. stayed until the further
Order of this Court. See transcript
of hearing this date. Also stayed as to
Dumigan*

SO ORDERED.

Charles L. Bryant
U. S. D. C.



5/26/75

MICROFILM

United States District Court

FOR THE
SOUTHERN DISTRICT OF NEW YORK

CIVIL ACTION FILE NO. 75 Civ. 471
(CLB)

W. T. GRANT COMPANY.

Plaintiff,

-against-

JOHN A. CHRISTENSEN, MAVIS CHRISTENSEN,
MARK S. HAINES, DANIEL QUINLAN, JOHN W.
WAITS, JOHN W. WAITS, d/b/a JOHN W. WAITS
ASSOCIATES, JWW, INC., CENTURION DEVELOPMENT
CORPORATION, CENTURION OF LOUISIANA, INC.,
MID-AMERICA DEVELOPMENT, DEVELOPMENT
CORPORATION OF MID-AMERICA, INC., UMBAUGH
POLE BUILDING COMPANY, INC., a/k/a UMBAUGH
CO., FRONTIER DEVELOPMENT CORPORATION,
JOHN DOES I through X, the names being
fictitious, the true names of said defendants
being unknown to plaintiff at the present
time.

Defendant

ADDITIONAL
SUMMONS

To the above named Defendants :

You are hereby summoned and required to serve upon

LIEBMAN, EULAU, ROBINSON & FERLMAN

plaintiff's attorney , whose address

32 East 57th Street, New York, New York 10022

an answer to the complaint which is herewith served upon you, within 20 days after service of this
summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be
taken against you for the relief demanded in the complaint.

Raymond D. Baughardt
Clerk of Court.

S. J. Harrison
Deputy Clerk.

Date: June 23, 1975

[Seal of Court]

-336-

-337-

Jurisdiction and Venue

1. The jurisdiction of this Court with respect to the first count of the complaint, a claim for treble damages, arises under (A) §4 of the Clayton Act (15 U.S.C. §15) by reason of defendants' violation of §2(c) of the Clayton Act as amended by §2(c) of the Robinson Patman Act (15 U.S.C. §13(c)), and (B) principles of common law. The jurisdiction of this Court with respect to plaintiff's common law causes of action is based upon (A) diversity of citizenship (28 U.S.C. §1332), and (B) principles of pendent jurisdiction. The matter in controversy on these causes of action based upon diversity of citizenship exceeds, exclusive of interest and costs, the sum of \$10,000.

2. Many of the acts and transactions complained of in the complaint occurred within the Southern District of New York, and the causes of action arose in New York. Defendants did business with plaintiff in connection with many of the acts and transactions complained of in the complaint within such district.

Citizenship

3. Plaintiff W.T. Grant Company (hereinafter "Grant" or "plaintiff") is a Delaware corporation, having its principal place of business at 1515 Broadway, New York, New York, and has been continuously engaged since 1906 in the business of operating retail stores, selling apparel, dry goods and related items, and providing services in support of such retail stores.

Many of plaintiff's retail stores are located in shopping centers wherein plaintiff, as lessee, rents its stores from a shopping center developer or other lessor.

4. Upon information and belief John A. Christensen (hereinafter "Christensen") is a resident of the State of Connecticut. At all times hereinafter mentioned, Christensen was employed by plaintiff in various capacities as a Real Estate Manager and since 1973 as Real Estate Vice President.

5. Upon information and belief, defendant Mavis Christensen is a resident of the State of Connecticut, and knew of, participated in and benefited by the wrongful acts of Christensen as set forth in the complaint.

6. Upon information and belief defendant Mark S. Haines (hereinafter "Haines") is a resident of the State of Georgia. At all times hereinafter mentioned Haines was employed by plaintiff as a Real Estate Manager.

7. Upon information and belief defendant Daniel Quinlan (hereinafter "Quinlan") is a resident of the State of Illinois. At all times hereinafter mentioned Quinlan was employed by plaintiff as a Real Estate Manager.

8. Upon information and belief John W. Waits (hereinafter "Waits") is a resident of the State of Kentucky. Upon information and belief at all times hereinafter mentioned Waits was the principal officer, stockholder, member or controlling person of defendants, John W. Waits, d/b/a John W. Waits

Associates (hereinafter "JWWA"), JWW, Inc. (hereinafter "JWWI"), Centurion Development Corporation (hereinafter "Centurion"), Centurion of Louisians, Inc. (hereinafter "COL"), Mid-America Development (hereinafter "MAD"), Development Corporation of Mid-America, Inc. (hereinafter "Development") and Frontier Development Corporation (hereinafter "Frontier").

9. Upon information and belief, defendant JWWI is a corporation duly organized and existing under the laws of the State of Kentucky, having its principal place of business in Kentucky.

10. Upon information and belief, Centurion is a corporation duly organized and existing under the laws of the State of Kentucky, having its principal place of business in Kentucky.

11. Upon information and belief COL is a corporation duly organized and existing under the laws of the State of Louisiana, having its principal place of business in Louisiana.

12. Upon information and belief, defendant MAD is a corporation duly organized and existing under the laws of the State of Kentucky, having its principal place of business in Kentucky.

13. Upon information and belief, defendant Umbaugh Pole Building Company, Inc., also known as Umbaugh Co., (hereinafter "Umbaugh") is a corporation duly organized and existing under the laws of the State of Ohio, having its principal place of business in Ohio.

14. Upon information and belief, defendant Development Corporation of Mid-America, Inc. (hereinafter "Development") is

a corporation duly organized and existing under the laws of the State of Kentucky, having its principal place of business in Kentucky.

15. Upon information and belief, Frontier is a corporation duly organized and existing under the laws of the State of Kentucky, having its principal place of business in Kentucky.

16. JWWA, JWWI, Centurion, COL, MAD, Umbaugh, Development, and Frontier, are sometimes collectively referred to as the "corporate defendants".

17. The corporate defendants, with the exception of Umbaugh, and Waits are, and at all pertinent times have been, engaged in the business throughout the United States of developing and constructing shopping centers, and the doing of all things necessary thereto, including inter alia the acquisition of land, and the construction of structures and improvements on such land.

Interstate and Foreign Commerce

18. The dealings and transactions alleged in this complaint involved and affected interstate commerce.

Allegations Common To All Counts

19. At all pertinent times Christensen, Haines and Quinlan (hereinafter sometimes collectively referred to as the "employee defendants") were employed by plaintiff in connection with the negotiation, approval of leases and/or the cancellation, transfer and assignment of such leases and all matters relating thereto, for stores located or to be located in shopping centers and elsewhere.

20. Plaintiff entrusted the employee defendants and each of them with the responsibility for negotiating and approving leases, and/or the cancellation, transfer and assignment of such leases, and all matters relating thereto, for such stores upon terms most favorable to plaintiff with respect to price, location and other terms of such leases and entrusted them with responsibility for negotiating, recommending, approving and certifying to plaintiff the desirability of entering into, cancelling, transferring or assigning such leases negotiated and approved by them on behalf of plaintiff.

21. In connection with the employee defendants' duties throughout the period of their employment, the employee defendants negotiated and approved leases and other matters relating thereto with Waits, the corporate defendants, various corporations under Waits' domination and control, and other corporations and entities including others with which he was affiliated and, upon information and belief, with defendants John Does I to X.

22. The employee defendants, in their capacity as—employees of plaintiff, were under a fiduciary duty to render exclusive, honest, faithful and loyal service to plaintiff and to execute the duties of their positions solely with regard to plaintiff's rights and interests.

23. At the time that the employee defendants entered into plaintiff's employ and continuously thereafter, the employee defendants represented to plaintiff that, for the salary and other compensation paid and credited to the employee defendants

by plaintiff, they would perform their duties as fiduciaries and would render to plaintiff their exclusive, honest, faithful and legal services and would execute the duties of their positions solely with regard to plaintiff's rights and interests.

24. Plaintiff relied upon all of the employee defendants' aforesaid representations as well as the fiduciary duties they owed to plaintiff, and acting in reliance thereon, plaintiff appointed Christensen Real Estate Vice President and employed and authorized all the employee defendants to negotiate and approve leases, and/or the cancellation, transfer and assignment of such leases, and all matters relating thereto, for plaintiff's stores located in, or to be located in, shopping centers and other locations throughout the United States.

25. The employee defendants were authorized and entrusted by plaintiff to, and they actually did, negotiate and approve leases, and/or the cancellation, transfer and assignment of such leases, and all matters relating thereto, for plaintiff's stores located in, or to be located in shopping centers and other locations throughout the United States.

26. Plaintiff leased stores, pursuant to recommendation, negotiation and approval by the employee defendants, located in, or to be located in, shopping centers and other locations throughout the United States, solely for use and operation in connection with the business and affairs of the plaintiff and for its sole benefit.

27. The employee defendants knew, when they made the aforesaid representations set forth in ¶23 supra, that said

representations were false and untrue and said employee defendants continuously made and reiterated the same representations with intent to deceive and defraud plaintiff.

28. Upon information and belief, at all times alleged in the complaint, Waits, the corporate defendants, and defendants John Does I to X knew that the employee defendants were so employed and owed such fiduciary duty to plaintiff.

29. Instead of intending to render, and rendering to plaintiff their exclusive honest and loyal services, and instead of intending to execute, and executing their positions with sole regard to plaintiff's rights and interests, the employee defendants during the said period of their employment by plaintiff, without the knowledge or consent of plaintiff, fraudulently, furtively, wrongfully, maliciously and secretly, and controlled by their own personal interests and desire for secret gains and with intent to deceive and defraud the plaintiff: (A) appropriated and diverted to themselves and shared among themselves secret profits including secret payments to the employee defendants in the nature of commissions, bribes, kickbacks, gifts, gratuities, bonuses and the like type of payments and monies belonging to the plaintiff; (B) appropriated and diverted corporate and business opportunities from plaintiff to themselves and to others, including, but not limited to, the corporate defendants including defendants John Does I through X; (C) caused plaintiff to execute leases and/or to cancel, transfer,

and assign such leases for stores located in, or to be located in, shopping centers throughout the United States which were not in plaintiff's best interests and were not the result of good faith arms-length negotiations; (D) used personnel and services belonging to the plaintiff for their own use, profit and benefit and appropriated plaintiff's property thereby; and (E) obtained for themselves and improved property for themselves, all in violation of their fiduciary duties.

30. Upon information and belief, at all times hereinafter mentioned, all of the defendants conspired together and maliciously and wrongfully entered into a scheme to defraud and deceive plaintiff and to deprive it of money and property and did defraud and deceive plaintiff and deprive it of its money and property through the deliberate design and purpose of paying secret payments to the employee defendants in the nature of commissions, bribes, kickbacks, gifts, gratuities, bonuses and the like type of payments in values and amounts unknown to plaintiff at the present time, but upon information and belief, exceeding the sum of \$1,000,000.

31. Upon information and belief, in pursuance of said conspiracy and scheme, all of the defendants did the acts and things alleged in the complaint and all such acts were participated in and done by all of the said defendants, or by

one or more of them, as steps in the conspiracy and for the purpose of defrauding and deceiving plaintiff and depriving plaintiff of its money and property as alleged in the complaint.

32. Upon information and belief Waits, the corporate defendants and defendants John Does I through X knowingly, wilfully and maliciously caused or induced plaintiff to enter into leases with them by systematically defrauding plaintiff and by inducing the employee defendants to breach their respective fiduciary duties by making secret payments to them which all of them in turn fraudulently concealed from and failed to disclose to plaintiff, the effect of which was to cause plaintiff to enter into leases at unreasonably high rentals, in locations that were calculated to advance the private interests of all defendants, and on other unfavorable terms rather than to advance the business of plaintiff.

33. Upon information and belief Waits, the corporate defendants and defendants John Does I through X secretly paid or caused to be paid to the employee defendants bribes, commissions, gifts, gratuities, bonuses and other compensation in connection with agreements for the making, cancelling, assigning or transferring of leases, and other real estate transactions, the amounts of which are unknown to plaintiff but which exceed the sum of \$1,000,000.

34. By reason of the foregoing, the rentals charged by Waits, the corporate defendants and John Does I through X for said leases were loaded and increased by at least the amounts of said payments made to the employee defendants as well as by additional loaded and excessive payments, and plaintiff was caused to enter leases in various locations, at excessive rentals, that it would not otherwise have effected had such secret payments and bribes not been made. Such payments constituted a load and overcharge to plaintiff for said rentals.

35. Upon information and belief, all of the defendants combined and conspired together to conceal, and in collusion with each other, did conceal from plaintiff the acts complained of in the complaint. Through such corrupt and fraudulent means, all said defendants induced plaintiff to enter said leases, which leases were not arrived at through normal arms-length bargaining but were entered through the corruption of plaintiff's trusted employees, and thereby effectively prevented plaintiff from dealing with other developers and lessors on a fair and competitive basis.

36. Upon information and belief, the acts set forth in the complaint were done with the intent that they be relied and acted upon by plaintiff and they were so relied and acted upon by plaintiff in entering into such leases to plaintiff's damage.

37. Plaintiff had no knowledge prior to on or about January 20, 1975 of the existence of the wrongful acts, transactions, and occurrences set forth in this complaint, and of the existence of the secret payments and bribes alleged in this complaint, all of which were deliberately and fraudulently concealed from the plaintiff by all of the defendants.

38. Plaintiff did not discover the existence and the extent of the crimes, frauds and breaches of fiduciary duty perpetrated upon plaintiff by all of the defendants as alleged in this complaint until on or about January 20, 1975.

COUNT ONE AGAINST
ALL DEFENDANTS

39. At all times herein relevant, the employee defendants were agents and representatives of plaintiff authorized and entrusted by plaintiff to, and said employee defendants actually did, negotiate and approve leases, and/or the cancellation, transfer and assignment of such leases, and all matters relating thereto, for or in behalf of plaintiff for plaintiff's stores located in, or to be located in shopping centers and other locations throughout the United States.

40. When so acting for or in behalf of plaintiff, the employee defendants, and Waits, the corporate defendants and defendants John Does I through X were engaged in interstate

commerce in regard to the dealings and transactions alleged in this complaint.

41. Upon information and belief, when so engaged in interstate commerce, and in the course of such commerce, the employee defendants did receive and accept from Waits, the corporate defendants, and defendants John Does I through X items of value in the form of bribes, commissions, gifts, gratuities, bonuses and other compensation.

42. Upon information and belief, when so engaged in interstate commerce and in the course of such commerce, Waits, the corporate defendants and defendants John Does I through X did pay and grant to the employee defendants bribes, commissions, gifts, gratuities, bonuses and other compensation.

43. Upon information and belief, such bribes, commissions, gifts, gratuities, bonuses and other compensation received and accepted by the employee defendants and paid and granted by Waits, the corporate defendants and defendants John Does I through X, were not so received and accepted, or paid and granted for services rendered in connection with the sale or purchase of goods, wares, or merchandise.

44. Upon information and belief said bribes, commissions, gifts, gratuities, bonuses and other compensation were received and accepted by the employee defendants and paid and granted by Waits, the corporate defendants and defendants John Does I through X in violation of §2(c) of the Clayton Act as

amended by §2(c) of the Robinson Patman Act (15 U.S.C. §13(c)).

45. As a result of the said violations of §2(c) of the Clayton Act, plaintiff has been and will continue to be damaged in the sum of at least \$5,000,000.

46. Under §4 of the Clayton Act (14 U.S.C. §15) by reason of defendants' violations of §2(c) of the Clayton Act, as hereinabove described, plaintiff is entitled to recover three times the amount of said damages, to wit, \$15,000,000 with appropriate interest thereon, and the cost of this suit, including reasonable attorneys' fees.

COUNT TWO AGAINST
ALL DEFENDANTS

47. All defendants acted in concert and in unlawful combination and conspiracy in restraint of trade, pursuant to a common scheme and plan designed to make, and they did actually make plaintiff their captive lessee, by eliminating competitive leasing opportunities and by freezing out other prospective lessors with the purpose and intent of, and in fact succeeding in, significantly raising the rents of property leased by plaintiff and causing plaintiff to execute leases for stores located in, or to be located in, shopping centers or elsewhere, which plaintiff would not have executed had said defendants not committed the wrongful acts set forth in this complaint.

48. Said defendants carried out and implemented said unlawful combination and conspiracy by paying or accepting bribes, or by committing the other wrongful acts set forth in this complaint.

49. The prices thereby paid by plaintiff to the corporate defendants, Waits and defendants John Does I through X were substantially and artificially inflated by reason of all defendants' illegal combination and conspiracy, and had the effect of reducing competition and raising the prices thus paid by plaintiff to insure to said co-conspirators the circuitous and surreptitious return of their bribes, all to plaintiff's damage.

50. Upon information and belief, the acts of all defendants were committed in violation of §340 of the General Business Law of the State of New York and in violation of the laws of other jurisdictions, and were done and will be done for the purpose of restraining trade, making plaintiff a captive lessee of the corporate defendants, Waits and John Does I through X and for the purpose of raising rentals paid by plaintiff to such defendants and such persons and companies.

51. As a result of said defendants' violation of §340 of the General Business Law of the State of New York and the violation of the laws of other jurisdictions plaintiff has been and will continue to be damaged in the sum of at least \$5,000,000.

COUNT THREE AGAINST
ALL DEFENDANTS

52. Plaintiff repeats and realleges each and every allegation contained in paragraphs 47 through 50 of this complaint as though fully set forth.

53. By reason of the foregoing, all defendants wrongfully, willfully and fraudulently for the purpose and intent of

damaging and destroying the trade and business of plaintiff and to restrain plaintiff in the free exercise of its trade and business and to deprive plaintiff of its money and property for the personal gain and profit of said defendants, have committed acts of unfair competition and attempted to appropriate plaintiff's business and corporate opportunities, all without plaintiff's knowledge or consent.

54. Plaintiff has lost corporate and business opportunities and profits, in an amount not ascertainable at this time, but which is believed to exceed the sum of \$5,000,000.

55. By reason of the foregoing, plaintiff has been damaged in the sum of at least \$5,000,000 and there is now due and owing from said defendants, jointly and severally to plaintiff, the sum of at least \$5,000,000 plus all penalties imposed by law, which have not been paid although duly demanded.

COUNT FOUR AGAINST
ALL DEFENDANTS

56. Plaintiff repeats and realleges each and every allegation contained in paragraphs 47 through 50, 53 and 54 of this complaint as though fully set forth.

57. At all times hereinbefore mentioned, all defendants have fraudulently, willfully, wrongfully, wantonly and maliciously conspired together and embarked on a course of conduct, the sole purpose of which is to prevent plaintiff from securing leases on a fair and competitive basis and to injure the business and property of plaintiff.

58. In the pursuit of such course of conduct, said defendants have appropriated to themselves plaintiff's business

and property, and all said defendants, or one or more of them, did the acts and things alleged in this complaint, and all such acts were participated in and done by all said defendants or one or more of them, for the sole purpose and intent of unfairly competing with plaintiff, injuring the business of plaintiff, restraining plaintiff in the full exercise of its trade and business and appropriating plaintiff's business and property for their own use and benefit.

59. By reason of the foregoing, there is due and owing from said defendants, jointly and severally, to plaintiff the sum of at least \$5,000,000, which has not been paid although duly demanded.

COUNT FIVE AGAINST
ALL DEFENDANTS

60. By reason of the foregoing, all of the defendants, received and hold in trust for plaintiff's use, benefit and account, the sum of at least \$5,000,000, which all of the defendants retained and still retain in violation of their fiduciary obligations and duties to plaintiff and there is now due and owing from said defendants jointly and severally to plaintiff, the sum of at least \$5,000,000 which has not been paid although duly demanded.

COUNT SIX AGAINST
ALL DEFENDANTS

61. By reason of the foregoing, all defendants, fraudulently deprived plaintiff of its money and property and

damaged plaintiff's business by committing the acts alleged in this complaint, including but not limited to permitting or inducing plaintiff to enter into leases for stores located in, or to be located in shopping centers and elsewhere in the United States and by approving and certifying to plaintiff leases and like type of documents with respect to stores located in, or to be located in shopping centers and elsewhere in the United States which leases and like documents failed to disclose the fact that the employee defendants negotiated such leases for stores located in, or to be located in, shopping centers and elsewhere in consideration of their receipt of secret payments and at improper and fraudulent rentals and at improper and improvident locations.

62. By reason of the foregoing, plaintiff has been damaged in the amount of at least \$5,000,000 and there is now due and owing from said defendants, jointly and severally to plaintiff, the sum of at least \$5,000,000, which has not been paid although duly demanded.

COUNT SEVEN AGAINST
ALL DEFENDANTS

63. Upon information and belief, by reason of the foregoing fraudulent, wrongful, malicious and wanton acts all defendants or one or more of them, conspired together and maliciously and willfully entered into a scheme to defraud and deprive plaintiff of its money and property and to damage its

business by committing the acts alleged in this complaint, including but not limited to permitting or inducing plaintiff to enter into leases for stores located in, or to be located in, shopping centers and elsewhere in the United States, and by approving and certifying to plaintiff leases and like type of documents with respect to stores located in, or to be located in, shopping centers and elsewhere in the United States, which leases and like documents failed to disclose the fact that the employee defendants negotiated such leases for stores located in, or to be located in, shopping centers and elsewhere, in consideration of their receipt of secret payments and at improper and fraudulent rentals and at improper and improvident locations for the benefit of and on account of plaintiff.

64. Upon information and belief, in pursuit of said conspiracy and scheme, said defendants did the acts and things alleged in this complaint and all such acts were participated in and done by all said defendants or by one or more of them as steps in the conspiracy and for the purpose of defrauding and deceiving plaintiff and concealing such acts as alleged in this complaint.

65. In reliance upon the purported propriety of said leases and like documents, plaintiff, acting without knowledge of the fraud and conspiracy alleged in this complaint, executed leases for stores located in, or to be located in, shopping centers and elsewhere without knowledge that it paid

excessive rentals for such leases and, without knowledge that it executed leases for locations that were not in its best interest but were in furtherance of the interests of said defendants.

66. By reason of the foregoing, plaintiff has been damaged in the sum of at least \$5,000,000 and there is now due and owing from said defendants, jointly and severally to plaintiff, the sum of at least \$5,000,000 which has not been paid although duly demanded.

COUNT EIGHT AGAINST
ALL DEFENDANTS

67. Upon information and belief, all defendants had and received monies as a result of the wrongful and fraudulent conduct of defendants as alleged in this complaint in an aggregate amount unknown to plaintiff, but upon information and belief, exceeding the sum of \$5,000,000.

68. By reason of the foregoing, plaintiff has been damaged in the sum of at least \$5,000,000 and there is now due and owing from said defendants, jointly and severally to plaintiff, the sum of at least \$5,000,000, which has not been paid although duly demanded.

COUNT NINE AGAINST
ALL DEFENDANTS

69. Upon information and belief, at all times hereinbefore mentioned, all defendants conspired together and maliciously and wilfully entered into a scheme to have and

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receive monies of plaintiff, in an aggregate amount unknown to plaintiff, but upon information and belief, exceeding the sum of \$5,000,000.

70. Upon information and belief, in pursuance of said conspiracy and scheme, said defendants or one or more of them did the acts and things alleged in this complaint, and all such acts were participated in and done by said defendants, or by one or more of them, as steps in the conspiracy and for the purpose of defrauding and deceiving plaintiff as alleged in this complaint.

71. By reason of the foregoing plaintiff has been damaged in the sum of at least \$5,000,000 and there is now due and owing from said defendants, jointly and severally to plaintiff, the sum of at least \$5,000,000 which has not been paid although duly demanded.

COUNT TEN AGAINST
CHRISTENSEN

72. During the period of Christensen's employment, plaintiff paid or credited to him salaries, other compensation and fringe benefits in the sum of at least \$613,407.00.

73. By reason of the foregoing, Christensen had and received from plaintiff, without consideration by reason of Christensen's wilful, wanton, and malicious fraud and breach of his fiduciary duties to plaintiff, said salary, other compensation and fringe benefits in the sum of at least \$613,407.00.

74. By reason of the foregoing, Christensen is indebted to plaintiff in the amount of at least \$613,407.00 and plaintiff has been damaged in the sum of at least \$613,407.00 and there is due and owing from Christensen to plaintiff the sum of at least \$613,407.00 which has not been paid although duly demanded.

COUNT ELEVEN AGAINST
HAINES

75. During the period of Haines' employment, plaintiff paid or credited to him salaries, other compensation and fringe benefits in the sum of at least \$232,681.00.

76. By reason of the foregoing, Haines had and received from plaintiff, without consideration by reason of Haines' wilful, wanton and malicious fraud and breach of his fiduciary duties to plaintiff, said salaries, other compensation and fringe benefits in the sum of at least \$232,681.00.

77. By reason of the foregoing, Haines is indebted to plaintiff in the amount of at least \$232,681.00 and plaintiff has been damaged in the sum of at least \$232,681.00 and there is due and owing from Haines to plaintiff the sum of at least \$232,681.00 which has not been paid although duly demanded.

COUNT TWELVE AGAINST
QUINLAN

78. During the period of Quinlan's employment, plaintiff paid or credited to him salaries, other compensation

and fringe benefits in the sum of at least \$96,540.00.

79. By reason of the foregoing, Quinlan had and received from plaintiff, without consideration by reason of Quinlan's wilful, wanton, and malicious fraud and breach of his fiduciary duties to plaintiff, said salaries, other compensation and fringe benefits in the sum of at least \$96,540.00.

80. By reason of the foregoing, Quinlan is indebted to plaintiff in the amount of at least \$96,540.00, and plaintiff has been damaged in the sum of at least \$96,540.00 and there is due and owing from Quinlan to plaintiff the sum of at least \$96,540.00, which has not been paid although duly demanded.

COUNT THIRTEEN AGAINST
ALL DEFENDANTS

81. At all times mentioned in this complaint, all defendants conspired together and maliciously and wilfully entered into a scheme to obtain from plaintiff salaries, other compensation and fringe benefits for the employee defendants without consideration by reason of said defendants' wilful, wanton and malicious fraud and conspiracy.

82. Upon information and belief, in pursuance of said conspiracy and scheme, said defendants or one or more of them, did the acts and things alleged in this complaint, and all such acts were participated in and done by said defendants, or by one or more of them, as steps in the conspiracy and for the purpose of defrauding and deceiving plaintiff as alleged in this complaint.

83. By reason of the foregoing, plaintiff has been damaged in the aggregate sum of at least \$5,000,000 and there is now due and owing from defendants, jointly and severally, to plaintiff the aggregate sum of at least \$5,000,000 which has not been paid although duly demanded.

COUNT FOURTEEN AGAINST
ALL DEFENDANTS

84. Upon information and belief, the acts committed by all defendants were in violation of §§155.05, 155.30, 155.35, 165.15, 165.20, 175.05, 175.10, 180.00 and 180.05 of the Penal Law and the public policy of the State of New York.

85. By reason of the foregoing, plaintiff has been damaged in the sum of at least \$5,000,000, and there is now due and owing from said defendants jointly and severally to the plaintiff the said sum of at least \$5,000,000, which has not been paid although duly demanded.

COUNT FIFTEEN AGAINST
ALL DEFENDANTS

86. Upon information and belief, at all times hereinbefore mentioned, all defendants conspired together and maliciously and wilfully entered into a scheme to violate §§155.05, 155.30, 155.35, 165.15, 165.20, 175.05, 175.10, 180.00 and 180.05 of the Penal Law and the public policy of the State of New York.

87. Upon information and belief, in pursuance of said conspiracy and scheme, said defendants did the acts and things alleged in this complaint, and all such acts were participated in

and done by said defendants, or by one or more of them, as steps in the conspiracy and for the purpose of defrauding and deceiving plaintiff as alleged in this complaint.

88. By reason of the foregoing, plaintiff has been damaged in the sum of at least \$5,000,000, and there is now due and owing from said defendants, jointly and severally, to plaintiff, the sum of at least \$5,000,000 which has not been paid although duly demanded.

COUNT SIXTEEN AGAINST
THE EMPLOYEE DEFENDANTS

89. By reason of the foregoing, the employee defendants each breached their contract of employment with plaintiff.

90. By reason of the foregoing, plaintiff has been damaged in the sum of at least \$5,000,000, and there is now due and owing from the employee defendants, jointly and severally to plaintiff the sum of at least \$5,000,000.

COUNT SEVENTEEN AGAINST
THE CORPORATE DEFENDANTS,
WAITS AND DEFENDANTS JOHN
DOES I THROUGH X

91. By reason of the foregoing, the corporate defendants, Waits and defendants John Does I through X induced the employee defendants to breach their contracts of employment with plaintiff.

92. By reason of the foregoing, plaintiff has been damaged in the sum of at least \$5,000,000, and there is now due and owing from said defendants, jointly and severally to plaintiff, the sum of at least \$5,000,000.

COUNT EIGHTEEN AGAINST
ALL DEFENDANTS

93. Upon information and belief, all defendants, conspired together and maliciously and wilfully entered into a scheme to breach the employee defendants' contracts of employment with plaintiff.

94. In pursuance of said conspiracy and scheme, said defendants, or one or more of them, did the acts and things alleged in this complaint, and all such acts were participated in and done by said defendants or by one or more of them, as steps in the conspiracy and for the purpose of breaching the employee defendants contracts of employment with plaintiff.

95. By reason of the foregoing, plaintiff has been damaged in the sum of at least \$5,000,000 and there is now due and owing from said defendants, jointly and severally to plaintiff the sum of at least \$5,000,000 which has not been paid although duly demanded.

COUNT NINETEEN AGAINST
ALL DEFENDANTS EXCEPT
CHRISTENSEN

96. Upon information and belief, at all times mentioned in this complaint, all defendants had due notice and

knowledge of Christensen's contract of employment with plaintiff.

97. Notwithstanding the fact that said defendants had due notice and knowledge of the aforesaid contract of employment, said defendants wrongfully, knowingly, intentionally, maliciously, wantonly and without reasonable justification or excuse induced, persuaded and enticed Christensen to violate and breach said employment contract and Christensen's fiduciary duties to plaintiff.

98. By reason of the foregoing, plaintiff has been damaged in the sum of at least \$5,000,000, and there is now due and owing, jointly and severally, from said defendants to plaintiff the sum of at least \$5,000,000, which has not been paid although duly demanded.

COUNT TWENTY AGAINST
ALL DEFENDANTS

99. Upon information and belief, at all times mentioned in this complaint, all defendants conspired together and wilfully, wantonly and maliciously entered into a scheme to induce the breach of Christensen's contract of employment with plaintiff.

100. In pursuance of said conspiracy and scheme, said defendants did the acts and things alleged in this complaint and all such acts were participated in and done by said defendants or by one or more of them, as steps in the conspiracy

and for the purpose of inducing the breach of Christensen's contract of employment with plaintiff.

101. By reason of the foregoing, plaintiff has been damaged in the sum of at least \$5,000,000, and there is now due and owing, jointly and severally, from said defendants to plaintiff the sum of at least \$5,000,000, which has not been paid although duly demanded.

COUNT TWENTY-ONE AGAINST
ALL DEFENDANTS EXCEPT
HAINES

102. Upon information and belief, at all times mentioned in this complaint, all defendants had due notice and knowledge of Haines' contract of employment with plaintiff.

103. Notwithstanding the fact that said defendants had due notice and knowledge of the aforesaid contract of employment, said defendants wrongfully, knowingly, intentionally, maliciously, wantonly and without reasonable justification or excuse induced, persuaded and enticed Haines to violate and breach said employment contract with Haines' fiduciary duties to plaintiff.

104. By reason of the foregoing, plaintiff has been damaged in the sum of at least \$5,000,000 and there is now due and owing, jointly and severally, from said defendants to plaintiff the sum of at least \$5,000,000 which has not been paid although duly demanded.

COUNT TWENTY-TWO AGAINST
ALL DEFENDANTS

105. At all times mentioned in this complaint, all defendants, conspired together and wilfully, wantonly and maliciously entered into a scheme to induce the breach of Haines' contract of employment with plaintiff.

106. In pursuance of said conspiracy and scheme, said defendants did the acts and things alleged in this complaint and all such acts were participated in and done by said defendants or by one or more of them, as steps in the conspiracy and for the purpose of inducing the breach of Haines' contract of employment with plaintiff.

107. By reason of the foregoing, plaintiff has been damaged in the sum of at least \$5,000,000 and there is now due and owing, jointly and severally, from said defendants to plaintiff the sum of at least \$5,000,000 which has not been paid although duly demanded.

COUNT TWENTY-THREE AGAINST
ALL DEFENDANTS EXCEPT QUINLAN

108. Upon information and belief, at all times mentioned in this complaint, all defendants had due notice and knowledge of Quinlan's contract of employment with plaintiff.

109. Notwithstanding the fact that said defendants had due notice and knowledge of the aforesaid contract of employment, said defendants wrongfully, knowingly, intentionally,

maliciously, wantonly and without reasonable justification or excuse induced, persuaded and enticed Quinlan to violate and breach said employment contract and Quinlan's fiduciary duties to plaintiff.

110. By reason of the foregoing, plaintiff has been damaged in the sum of at least \$5,000,000, and there is now due and owing, jointly and severally, from said defendants to plaintiff the sum of at least \$5,000,000 which has not been paid although duly demanded.

COUNT TWENTY-FOUR AGAINST
ALL DEFENDANTS

111. At all times mentioned in this complaint, all defendants conspired together and wilfully, wantonly and maliciously entered into a scheme to induce the breach of Quinlan's contract of employment with plaintiff.

112. In pursuance of said conspiracy and scheme, said defendants did the acts and things alleged in this complaint and all such acts were participated in and done by said defendants or by one or more of them, as steps in the conspiracy and for the purpose of inducing the breach of Quinlan's contract of employment with plaintiff.

113. By reason of the foregoing plaintiff has been damaged in the sum of at least \$5,000,000, and there is now due and owing, jointly and severally, from said defendants to plaintiff the sum of at least \$5,000,000 which has not been paid although duly demanded.

COUNT TWENTY-FIVE AGAINST
ALL DEFENDANTS

114. By reason of the foregoing, all defendants wantonly, wilfully and maliciously converted to their own use the sum of at least \$5,000,000 and there is now due and owing from said defendants, jointly and severally to plaintiff, the sum of at least \$5,000,000 which has not been paid although duly demanded.

COUNT TWENTY-SIX AGAINST
ALL DEFENDANTS

115. Upon information and belief, at all times hereinbefore mentioned, all defendants entered into a conspiracy and scheme to convert plaintiff's property.

116. In pursuance of said conspiracy and scheme, said defendants did the acts and things alleged in this complaint and all such acts were participated in and done by all said defendants or by one or more of them as steps in the conspiracy and for the purpose of converting plaintiff's property.

117. By reason of the foregoing, plaintiff has been damaged in the sum of at least \$5,000,000 and there is now due and owing, jointly and severally by all said defendants to plaintiff the sum of at least \$5,000,000 which has not been paid although duly demanded.

118. By reason of the foregoing, all of the defendants maliciously, wantonly, wilfully and without justification or

excuse, committed a prima facie tort against plaintiff and there is now due and owing from said defendants jointly and severally to plaintiff, the sum of at least \$5,000,000 which has not been paid although duly demanded.

COUNT TWENTY-SEVEN AGAINST
ALL DEFENDANTS

119. By reason of the foregoing plaintiff was compelled to incur and has, and will continue to incur, costs and expenses, including investigation expenses, accounting fees and legal fees arising from the investigation, institution and prosecution of this action, the amount of which is unknown at this time but is expected to exceed the sum of \$300,000.

120. By reason of the foregoing, plaintiff has been damaged in the sum of at least \$300,000. and there is now owing jointly and severally, from said defendants to plaintiff the sum of at least \$300,000. which sum has not been paid although duly demanded.

COUNT TWENTY-EIGHT AGAINST
ALL DEFENDANTS

121. By reason of the foregoing, plaintiff is entitled to an award of punitive damages, jointly and severally, against all defendants in the sum of at least \$5,000,000.

WHEREFORE, plaintiff prays:

1. That plaintiff have judgment against each and every of the defendants, jointly and severally, on the First

Count in the sum of \$15,000,000, being a sum treble the damages sustained by plaintiff, together with appropriate interest thereon, and the cost of this suit, including a reasonable attorneys' fees.

2. That each of the defendants be enjoined pendente lite and permanently from continuing to engage in any of the wrongful practices complained of in this complaint.


3. That plaintiff have judgment against each and every of the defendants, jointly and severally, in the sum of at least \$5,300,000, together with appropriate interest.

4. That plaintiff have judgment against each and every of the defendants, jointly and severally, for punitive damages in the sum of at least \$5,000,000.

5. That plaintiff have such other and further relief as to the Court may seem just and proper.

LIEBMAN, EULAU, ROBINSON & PERLMAN

By


Herbert Robinson,
A Member of the Firm

Office and P.O. Address
32 East 57th Street
New York, N.Y. 10022
(212) 355-5522

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
W. T. GRANT COMPANY,

Plaintiff-Appellee,

-against-

MARK S. HAINES,

Defendant-Appellant.
-----x

Docket No. 75-7385

:
NOTICE OF MOTION
FOR ORDER REMOVING
: IN CAMERA RESTRICTION
ON PORTION OF RECORD
ON APPEAL

S I R S:

PLEASE TAKE NOTICE that the undersigned hereby moves this Court for an Order directing that the in camera restriction as to the transcription of the January 31, 1975 interrogation of defendant-appellant Mark S. Haines be removed and that document be furnished to counsel for defendant-appellant Haines for their use in prosecuting the appeal herein.

Dated: New York, New York
August 15, 1975.

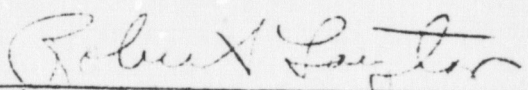
Yours, etc.,

LAYTON and SHERMAN
Attorneys for Defendant-Appellant
Mark S. Haines

TO:

LIEBMAN, EULAU, ROBINSON &
PERLMAN
Attorneys for Plaintiff-
Appellee
32 East 57th Street
New York, N.Y. 10022

By


(A Member of the Firm)
50 Rockefeller Plaza
New York, N. Y. 10020
(212) 586-4300

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
W. T. GRANT COMPANY,

Plaintiff-Appellee,

:
Docket No. 75-7385

-against-

MARK S. HAINES,

Defendant-Appellant.
-----x

:
AFFIDAVIT
:

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ROBERT LAYTON, being duly sworn, deposes and says:

1. I am a member of the Bar of this Court and of the firm of Layton and Sherman, attorneys for defendant-appellant Mark S. Haines, who is appealing to this Court from certain portions of an Order of the Honorable Charles L. Brieant, Jr. below dated June 3, 1975.

2. In preparation for the transmittal of the record below to this Court, I learned that the transcript of the recorded interrogation of January 31, 1975 of Mr. Haines which forms the substance of the appeal herein and which was submitted ex parte

to the District Court below was not contained in the files of the District Court.

3. The main thrust of the appeal presently pending relates to our motion below to disqualify counsel for plaintiff-appellee from further representation of plaintiff-appellee, to turn over to counsel for Mr. Haines the tape-recorded interrogation of him made on January 31, 1975, and related relief emanating from the conduct of counsel for plaintiff-appellee in violation of DR 7-104 of the Code of Professional Responsibility on January 31, 1975. On January 31, 1975 counsel for plaintiff-appellee filed the instant action seeking \$15 million in damages against Mr. Haines, secured an order to show cause seeking to attach \$240,000 of his assets, to enjoin him from transferring any assets, and interrogated him for some 5-1/2 hours without disclosing the institution of the action and in the absence of any counsel representing him.

4. In opposition to the motion below, counsel for plaintiff-appellee submitted a typed transcript of the 5-1/2 hour interrogation of Mr. Haines by transmitting it ex parte to the Court designating the said typed transcript as an in camera exhibit. The affidavit of Allan J. Kirschner, Esq., sworn to the 9th day of April, 1975, quoted selected extracts from that transcript. The pertinent portion thereof is annexed hereto as Exhibit "A".

5. The opinion of the District Court quoted an entire paragraph of that typed transcript in support of its decision denying the motion to dismiss or disqualify plaintiff's counsel. That portion of the District Court's opinion below quoting from the transcript is annexed hereto as Exhibit "B".

6. No reason appears why materials furnished to the Court and which were relied on by the Court in its decision should remain unavailable to the attorneys for the party directly involved on this issue. Counsel for defendant-appellant Haines accordingly moved initially before the District Judge as required pursuant to Federal Rule of Appellate Procedure 10(e) for an order directing that the transcript be made available in the record on appeal and for reproduction in the Appendix.

7. The District Court denied that motion by its memorandum decision directing that the transcribed interrogation would be transmitted to the Court of Appeals in camera, subject to this Court's determination as to whether it should be made available to counsel for defendant-appellant. That endorsed opinion is annexed hereto as Exhibit "C".

8. The objection interposed by counsel for plaintiff-appellee W. T. Grant Company is that making available the transcript of the interrogation is improper as an untimely attempt at discovery.

9. It is respectfully submitted that litigation in the United States District Courts is conducted publicly, except under the most compelling of circumstances involving matters such as questions of national security, trade secrets, information of a confidential nature whose revelation would irreparably prejudice one of the parties involved. Here, no such considerations are involved. This is not a case involving national security secrets. In U.S. v. New York Times Company, 328 F.Supp. 324 (1971), the District Court reluctantly conducted an in camera hearing from which the public was excluded due to the state secrets doctrine. There the attorneys for both sides were, however, permitted access to the documents.

10. Here the issue before the Court relates to the propriety of the conduct of counsel for plaintiff on January 31, 1975, i. e., the interrogation they conducted. It strikes at the heart of counsel's ability to argue the instant appeal absent the material available to opposing counsel and which formed a basis of the Court's decision below. Such an unwarranted restriction operates as a serious limitation on counsel in preparation of this appeal.

11. Plaintiff-appellee W. T. Grant Company and its attorneys have had in their possession for some months the information elicited from Mr. Haines at a time when he was not

represented by counsel, have made use of that information in affidavits filed with the Court below, have made ex parte submission of that information to the Court and have refused to allow opposing counsel to know what transpired during their 5-1/2 hour interrogation in order to prepare briefs and arguments before this Court.

12. It is respectfully submitted that counsel are indeed hampered by an unfounded attempt to conduct this litigation as though it involved a grand jury proceeding. Our ability to effectively represent appellant is hindered by the lack of knowledge as to the subject matter inquired into of Mr. Haines, the admissions obtained from him, documents signed by him, the suggestions, threats, promises or other devices employed by counsel on January 31, 1975. The only reason offered for retaining a portion of the record before this Court as an in camera document is that it would afford Mr. Haines discovery earlier than he would otherwise be entitled to. Obviously, the interrogation is discoverable at a point in the litigation. That is not the point. Plaintiff-appellee chose to submit this document to the Court in apparent aid of its position.


13. It is respectfully submitted that there is no valid reason to conceal a portion of the record below from counsel

appearing before this Court, except under the most extraordinary circumstances. No such circumstances are here present. It is, therefore, respectfully requested that the typewritten transcript of the Haines interrogation of January 31, 1975 be furnished to counsel for defendant-appellant for their use as well as for reproduction in the Appendix to be filed herein.


ROBERT LAYTON

Sworn to before me this

15th day of August, 1975.


Notary Public

ASSUNTA M. SPARANO
Notary Public, State of New York
No. 24-377775
Qualified in Kings County
Commission Expires March 30, 1977

Such signed statement also released Grant from any claim relating to the polygraph.* Thus, Haines statement that he was not given the opportunity to obtain a lawyer is belied by his own written statement. Moreover his other recent assertion of promises made to him is belied not only by the transcript of his interview but by the very document signed by Haines on that date.

11. When Haines was finished with the polygraph examiner, I escorted Mr. Haines to yet another room and asked him if he had had any lunch. He said that he had not, whereupon I asked him if he wanted to have lunch. He responded that he did not. I told him that I too did not have any lunch and that I was going to order a coke for myself and I asked him if he wanted a coke or anything else. It is my best recollection that Haines did not ask for or have a Coke and that the Coca-Cola was delivered to me. Thus, the inference that he was refused lunch is entirely inaccurate and his recollection concerning the Coca-Cola is also faulty.

12. The interview that followed in the afternnon also lasted no longer than 45 minues and, again, was tape recorded with Haines' permission. At the outset of that interview,

*Defendant Christensen who also agreed to take a polygraph examination on that day, signed an identical agreement which is annexed hereto as Exhibit 5.

the following questions were asked and answered:

"Q. Do you understand that our conversation is being tape recorded? Is that correct?

A. That is correct.

Q. And you have no objection to that, is that correct?

A. No objection.

Q. You are doing this voluntarily?

A. Yes, I am.

Q. No one has made any promises of any kind to you, have they?

A. No.

* * *

Q. We spoke this morning, is that correct?

A. That is right.

Q. And our conversation was tape recorded at that time as well?

A. That is correct.

Q. And that conversation was also recorded with your permission and consent, is that correct?

A. That is correct."

Thereafter, we recapped everything that was discussed that morning between Haines and myself, and Haines and Mr. Detweiler. At the end of the conversation at approximately 2:55 P.M., I asked Mr. Haines if he had anything else that he wished to say whereupon he stated "No, I do not". The interview was then

American Bar Association (Informal Opinion No. 908, issued February 24, 1966), dealt with the question of "attorney interviewing and taking a statement from an adverse party who he may reasonably expect will retain counsel but is not represented."

The Committee therein states:

"... we do not feel that there is anything unethical in the attorney for a potential plaintiff interviewing the potential defendant, and taking his statement, if the attorney advises the potential defendant witness that he is conducting the interview and attempting to take the statement in his position as attorney for the claimant."

Here there was an apparent attempt to mislead in that the attorney implied that there was uncertainty as to whether Haines would be sued, and a possibility that Haines might be able to exculpate himself and keep his job. In the attorneys words:

"If you have any additional information which you think would help us, tell us that. We'd like to be able to clear your name from this if that's possible. There's two things, one, give us any other information that you can. Two, give us authority to do further checking into you and your relationship with Mr. Waits." [Emphasis added-quoted from in camera exhibit referred to at p.3 of the affidavit of Allan J. Kirschner, Esq., sworn to April 9, 1975.]

This Court is satisfied upon all it has heard that nothing

Endorsement

W. T. GRANT COMPANY, Plaintiff v. JOSE A. CHRISTENSEN, et al., Defendant

75 Civ. 471-CLB

The Court declines to direct production of the in camera exhibit at this time. See Parla v. Matson Navigation Co., 28 F.R.D. 348 (S.D.N.Y. 1961); United States v. Projansky, 44 F.R.D. 550 (S.D.N.Y. 1968), and cases therein cited. It shall be submitted in camera to the Court of Appeals as part of the record.

This determination is, of course, without prejudice to any other or different direction which the Court of Appeals may make should that Court find that the effect of the content of the in camera exhibit, as distinguished from the fact of its taking, ought to be the subject of relevant argument on the appeal. This Court believes all of the exhibit which is relevant to the appeal has been quoted in its memorandum decision.

All available transcripts of hearings shall be docketed and filed forthwith.

So Ordered.

Dated: New York, New York
July 31, 1975

Charles L. Briant Jr.
CHARLES L. BRIANT, JR.,
U. S. D. J.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

ASSUNTA M. SPARANO, being duly sworn, deposes and says:

That deponent is not a party to the action, is over 18 years of age and resides in Brooklyn, New York; that on the 15th day of August, 1975, deponent served the within Notice of Motion for Order Removing in camera Restriction on Portion of Record on Appeal and Affidavit of Robert Layton upon:

LIEBMAN, EULAU, ROBINSON & PERLMAN
Attorneys for Plaintiff-Appellee
W. T. Grant Company
32 East 57th Street
New York, New York 10022

the address designated by said attorneys for that purpose by depositing same enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

Assunta M. Sparano
ASSUNTA M. SPARANO

Sworn to before me this
15th day of August, 1975.

Carolyn J. Hill
Notary Public

Notary Public, State of New York
No. 31-6291070
Qualified in New York County
Commission Expires March 30, 1976

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
W. T. GRANT COMPANY,

Plaintiff-Appellee,

-against-

MARK S. HAINES,

Defendant-Appellant.
-----x

Docket No. 75-7385

AFFIDAVIT IN OPPOSITION
TO MOTION FOR ORDER
REMOVING IN CAMERA
RESTRICTION ON PORTION
OF RECORD ON APPEAL

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

TED M. ROSEN, being duly sworn, deposes and says:

1. I am a member of the Bar of this Court, am associated with Liebman, Eulau, Robinson & Perlman, attorneys for plaintiff-appellee, W.T. Grant Company ("Grant") and submit this affidavit in opposition to defendant-appellant, Mark S. Haines' ("Haines") motion which seeks improperly and prematurely to obtain a copy of the transcript of Haines' conversations with an attorney of this firm on January 31, 1975 ("the transcript"). As will be shown infra the requested relief will impair substantive rights of Grant in regard to the conduct of this lawsuit.

2. Grant opposes the present application because the relief requested is unnecessary to accomplish its stated

8/21/75

objectives to allow counsel for defendant-appellant Haines to effectively represent their client upon this appeal. Additionally, Grant opposes the present motion on the grounds that said motion is in reality a premature attempt at discovery, the granting of which would substantially impair Grant's rights to conduct discovery of Haines.

3. It is to be noted that the reason urged in the District Court by counsel for Haines in support of his application for an order directing Grant to submit the transcript for inclusion as part of the record on appeal to this Court is apparently no longer urged. That argument was that inclusion of the transcript in the record was necessary to ensure that all items that were before the District Court be before the Court of Appeals. Inclusion of the transcript as an in camera portion of the record on appeal, as provided by the order of the District Court, allows this Court to review all documents that were before the District Court.

4. This is an action for fraud, deceit, conflict of interest, conversion, conspiracy and violation of anti-trust laws of the United States based upon the payment and receipt of various types of kickbacks of several hundred thousand dollars with respect to leases, negotiated and entered into on behalf of the plaintiff. Specifically, the amended complaint alleges that

certain defendants paid various types of kickbacks and commissions to other defendants, high officials of plaintiff's real estate department for the purpose of entering into and obtaining leases with plaintiff. The making and receipt of payments have been documented by various checks and statements of witnesses and by admissions made by the individual defendants themselves, who conceded that they received various monies and gifts from certain defendants for the purpose of influencing their conduct on behalf of plaintiff.

5. The amended complaint charges that Haines, who had been employed in various capacities by Grant for approximately ten years, and who most recently was employed as Grant's Real Estate Manager for the Southern Region was one of those employees of Grant who received bribes and kickbacks. Counsel for Grant together with Haines' superior met with Haines on January 31, 1975, prior to the service upon Haines of the Order to Show Cause and complaint in this action.

6. That meeting was conducted during two sessions on January 31, 1975, as revealed in the affidavit of Allan J. Kirschner, sworn to on the 9th day of April, 1975 and submitted in opposition to Haines' motion in the District Court to dismiss this action or disqualify this law firm from representing Grant. A copy of that affidavit is annexed as Exhibit "A", hereto.

Contrary to the assertions in the affidavit of Robert Layton submitted in support of the present motion, the interview did not last for 5-1/2 hours. As the Kirschner affidavit establishes, the first conversation between Haines and one of Grant's attorneys lasted approximately 30 minutes and the second lasted for approximately 30 or 45 minutes. Haines also, by voluntary consent in writing, took a polygraph test.

7. As Exhibit "A" demonstrates, no promises were made to Haines during the course of the conversation; no threats were made to Haines; and Haines was advised of his right to obtain counsel. As the Kirschner affidavit further shows, during that interview Grant's attorney informed Haines of the facts that they already knew relating to Haines' activities with certain other defendants and showed him documentary proof they had in their possession. Grant's attorneys then proceeded to interview Haines in regard to these matters.

8. There was nothing improper about the activities conducted on behalf of Grant by its attorneys on that date. Grant, through its executives and attorneys had every right to inquire of other executives about certain alleged improprieties which had recently come to the attention of Grant's management. These executives, including Haines, had a duty, not only to be honest and to faithfully perform their obligations while in the

employ of Grant, but a further duty to make full disclosure of any impropriety that they were involved in or knew of which occurred in the company. These high level and high paid executives owed the highest degree of loyalty and fiduciary duty to Grant. Since Haines was not at that time represented by an attorney in this matter there was nothing improper in the discussions had with him.

9. The question of the propriety of the conduct of Grant's attorney on July 31, 1975 is not now before the Court. That indeed is one of the questions to be resolved upon the appeal itself. It is inconceivable that Haines' counsel will be hampered in any way in arguing this appeal without having access to the transcript. As will be further shown, allowing Haines' counsel access to the transcript would be violative of substantive rights of plaintiff in respect to conducting this lawsuit.

10. The questions that will be resolved upon this appeal in regard to the propriety or impropriety of the conduct of Grant's attorneys will not be resolved on the basis of the substance of the conversations contained in the transcripts. Rather the determination of the questions will be based upon the circumstances surrounding the conduct of the attorneys and the parties at the time. If subsequently any attempt is made to introduce into evidence any item obtained during the course of

the January 31, 1975 interviews, the admissibility of that item will be argued at that time. That is not now the question to be resolved.

11. It is further submitted that counsel for Haines has available to him as a source of what transpired on January 31, 1975 a party who was present - his client Mark S. Haines. The recollection of Haines, an intelligent, literate, sophisticated former executive of Grant can enable his counsel to argue as he may choose, any impropriety based on the substance of what was said.

12. The relief requested by Haines, if granted, would effectively destroy substantive rights of Grant in regard to the conduct of this litigation. By means of several orders, the District Court, per the Honorable Charles L. Brieant, Jr., District Judge, has stayed Grant from pursuing discovery of various defendants in this litigation including defendant Haines. At a hearing held before Judge Brieant on June 23, 1975, Judge Brieant continued the stay of discovery against Haines, pending the present appeal. At a subsequent hearing on July 31, 1975, Judge Brieant declined to remove the stay. As a result, Grant has not yet taken the examination before trial of defendant Haines although Grant had theretofore obtained an order permitting the taking of discovery prior to the expiration of thirty (30) days from the commencement of this action.

13. As the accompanying memorandum of law shows, whether or not Haines may ultimately inspect the transcript, Grant has the right to examine Haines under oath before allowing Haines to examine said transcript. This is a right of great substantive value, the exercise of which can greatly affect Grant's ability to prove its claims.

14. Grant objects to the present motion on the additional ground that it is prematurely made at this time. The order appealed from denied a motion by Haines which sought inter alia, as alternative relief an order directing Grant's attorneys to deliver to counsel for Haines "all tapes, notes, records, or other documents relating to" the conversations between Grant's attorneys and Haines on January 31, 1975. It is submitted that granting of the requested relief can only be made after the instant appeal has properly been conducted, and not upon this motion. Accordingly, the relief requested on this motion is hardly procedural, but goes to the merits of the appeal itself.

15. It is submitted that the inclusion of the transcript as an in camera exhibit will enable this Court to review what was before the District Court. This Court will also be enabled to ascertain the substance of the interviews between Haines and Grant's attorneys should it deem consideration of the

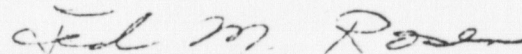
substance necessary to the present appeal. The in camera designation will also preserve Grant's rights to conduct proper discovery.

16. As the accompanying memorandum of law demonstrates, there are other situations, in which Courts of Appeal have reviewed in camera exhibits. Thus, the procedure is not a novel one.

17. The submission of the transcript to the District Court as an in camera exhibit was not made ex parte as counsel for Haines would have this Court believe. The fifth paragraph of the Kirschner affidavit (Exhibit "A"), copies of which were served upon counsel for all parties in this litigation, indicates clearly: "A copy of the transcript of Haines' recorded conversations that I participated in will be given to the Court for its in camera review." Copies of the letter dated April 10, 1975 (Exhibit "B") forwarding the transcript to the District Court and indicating quite clearly that copies of the transcript had not been furnished to opposing counsel were sent to all counsel. Yet despite this notice of the submission of the transcript as an in camera exhibit, Haines did not raise objection to that designation until his motion returnable July 29, 1975 to settle the record on appeal. It is submitted that Haines has waived his right to object to the in camera designation of the transcript.

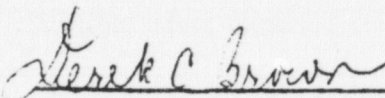
18. The District Court has stated in its endorsed opinion (Exhibit "C" to the moving papers) that "all of the exhibits which is relevant to the appeal has been quoted in its memorandum decision." Accordingly, it is submitted that Haines could not have been prejudiced in the District Court by the in camera designation. The District Court declined to direct production citing inter alia Parla v. Matson Navigation Co. As is discussed in the accompanying memorandum of law, this case establishes Grant's right to take the deposition of Haines before it is required to turn over the transcript to his counsel.

19. For the foregoing reasons, I respectfully request that the motion by defendant-appellant Haines be denied in all respects.



Ted M. Rosen

Sworn to before me this
21st day of August, 1975



Derek C. Brown
Notary Public, State of New York
No. 02-4605938
Qualified in New York County
Commission Expires March 30, 1976